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POSSIBLE AMENDMENTS TO THE "1916 ANTIDUMPING ACT"

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

MARCH 11, 1980

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CONTENTS

ADMINISTRATION WITNESS

Cassidy, Robert C., Jr., General Counsel, Office of the U.S. Trade Representative ..... Page 2

PUBLIC WITNESSES

Ad Hoc Labor-Industry Trade Commission, Peter Buck Feller, McClure & Trotter, accompanied by Charles Owen Verrill, Jr., Patton, Boggs & Blow; and Gary Horlick, Steptoe & Johnson 14
American Importers Association, N. David Palmeter, accompanied by Donald B. Cameron, Daniels, Houlihan & Palmeter 25
AMF, Inc., Richard O. Cunningham, Steptoe & Johnson 87
Consumers for World Trade, Seymour J. Rubin, member of the board 96
Cunningham, Richard O., Steptoe & Johnson, on behalf of AMF, Inc 87
Ehrenhaft, Peter D., Hughes, Hubbard & Reed 36
Feller, Peter Buck, McClure & Trotter, accompanied by Charles Owen Verrill, Jr., Patton, Boggs & Blow; and Gary Horlick, Steptoe & Johnson, on behalf of the Ad Hoc Labor-Industry Trade Commission 14
Palmeter, N. David, accompanied by Donald B. Cameron, Daniels, Houlihan & Palmeter, on behalf of the American Importers Association 25
Rubin, Seymour J., member of the board, Consumers for World Trade 96

COMMUNICATIONS

AFL-CIO, Ray Denison, director, department of legislation 122
Chapman, Dudley H., Chapman & Clearwaters 129
Denison, Ray, director, department of legislation, AFL-CIO 122
Dickerson, Mark S., assistant counsel, General Time Corp 125
Ferroalloys Association, George A. Watson, president 116
General Time Corp., Mark S. Dickerson, assistant counsel 125
Los Angeles County Bar Association, Peter de Krassel, chairman, customs law committee 112
Mathias, Hon. McC. Charles, Jr., a U.S. Senator from the State of Maryland 109
Suchman, Peter O., Sharretts, Paley, Carter & Blauvelt 134
Watson, George A., president, the Ferroalloys Association 116

ADDITIONAL INFORMATION

Committee press release 1
Letter to Mr. Civiletti from Senator Heinz 12
Questions to the administration from the subcommittee 140

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POSSIBLE AMENDMENTS TO THE "1916 ANTIDUMPING ACT"

TUESDAY, MARCH 11, 1980

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m. in room 2221, Dirksen Senate Office Building, Hon. Abraham Ribicoff (chairman of the subcommittee) presiding.

Present: Senators Ribicoff, Bradley, Danforth, Chafee, and Heinz.

[The press release announcing this hearing follows:]

[Press Release No. H-12, Feb. 27, 1980]

FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE SETS HEARING ON AMENDMENTS TO SECTION 801 OF THE REVENUE ACT OF 1916 (15 U.S.C. 72), THE "1916 ANTIDUMPING ACT"

Senator Abraham Ribicoff (D., Ct.), Chairman of the Subcommittee on International Trade of the Committee on Finance, announces today that the Subcommittee will hold a hearing on Tuesday, March 11, 1980, on amendments to the so-called 1916 Antidumping Act, section 801 of the Revenue Act of 1916 (15 U.S.C. 72). Senator Ribicoff noted that title V of S. 223 proposes certain amendments to the 1916 Antidumping Act.

The hearing will begin at 10:00 a.m., in Room 2221 of the Dirksen Senate Office Building.

In considering amendments to the 1916 Antidumping Act, the Subcommittee invites comments on all relevant issues, including the following:

(1) What should be the purpose of the 1916 Antidumping Act, e.g., to compensate individuals for damages to them (single damages) resulting from dumping, or to punish dumping undertaken with specific intent, including an intent to lessen competition or restrain or monopolize trade (treble damages)?

(2) What changes in the criteria for relief should be made, e.g., if compensation (single damages) is stressed, should a specific intent still be required; if treble damages are to be imposed, should the present intent requirement be changed to impose an "effects" test?

(3) What defenses should be available against an action under the 1916 Antidumping Act, e.g., meeting competition, functional discounts, and so on?

(4) Should remedies include injunctive relief of either a permanent or temporary nature?

(5) How should the 1916 Antidumping Act and title VII of the Tariff Act of 1930 interrelate, e.g., what effect should a prior administrative determination under title VII of the Tariff Act of 1930 on such matters as the existence of dumping, the amount of dumping margins, and injury have on subsequent court proceedings under the 1916 Antidumping Act; should proceedings under the 1916 Antidumping Act and title VII of the Tariff Act of 1930 be permitted to run concurrently, or should proceedings under the 1916 Antidumping Act only be permitted following a decision under title VII of the Tariff of 1930.

(6) Are special provisions needed on such matters as enforcement of judgments and venue?

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(7) What is the relationship of amendments to the 1916 Antidumping Act with respect to the international obligations of the United States, including obligations under the General Agreement on Tariffs and Trade?

Requests to testify.—Chairman Ribicoff stated that witnesses desiring to testify during this hearing must make their requests to testify to Michael Stern, Staff Director, Committee on Finance, Room 2227, Dirksen Senate Office Building, Washington, D.C. 20510, not later than Thursday, March 6, 1980. Witnesses will be notified as soon as possible after this date as to whether they are scheduled to appear. If for some reason the witness is unable to appear at the time scheduled, he may file a written statement for the record in lieu of the personal appearance.

Consolidated testimony.—Chairman Ribicoff also stated that the Subcommittee urges all witnesses who have a common position or with the same general interest to consolidate their testimony and designate a single spokesman to present their common viewpoint orally to the Subcommittee. This procedure will enable the Subcommittee to receive a wider expression of views than it might otherwise obtain. Chairman Ribicoff urged very strongly that all witnesses exert a maximum effort, taking into account the limited advance notice, to consolidate and coordinate their statements.

Legislative Reorganization Act.—Chairman Ribicoff observed that the Legislative Reorganization Act of 1946, as amended, and the rules of the Committee require witnesses appearing before the Committees of Congress to file in advance written statements of their proposed testimony and to limit oral presentations to brief summaries of their arguments.

Chairman Ribicoff stated that in light of this statute and the rules, and in view of the large number of witnesses who are likely to desire to appear before the Subcommittee in the limited time available for the hearing, all witnesses who are scheduled to testify must comply with the following rules:

1. All witnesses must include with their written statements a one-page summary of the principal points included in the statement.

2. The written statements must be typed on letter-size (not legal size) paper and at least 100 copies must be delivered to Room 2227, Dirksen Senate Office Building not later than noon of the last business day before the witness is scheduled to appear.

3. Witnesses are not to read their written statements to the Subcommittee, but are to confine their oral presentation to a summary of the points included in the statement.

4. No more than ten minutes will be allowed for the oral summary.

Witnesses who fail to comply with these rules will forfeit their privilege to testify.

Written statements.—Witnesses who are not scheduled to make an oral presentation, and others who desire to present their views to the Subcommittee, are urged to prepare a written statement for submission and inclusion in the printed record of the hearings. These written statements should be submitted to Michael Stern, Staff Director, Committee on Finance, Room 2227, Dirksen Senate Office Building, Washington, D.C. 20510, not later than Friday, April 4, 1980.

Senator RIBICOFF. The committee will be in order.

Today we are meeting to hear testimony on possible amendments of the so-called 1916 Antidumping Act, sections 800 and 801 of the Revenue Act of 1916.

Senator Danforth and others have made specific proposals to change the law. In addition to commenting on these specific proposals, we welcome comments concerning other changes on the policy issues raised by any proposed change.

When Senator Danforth arrives, he might have some comments that he would like to make.

Our first witness will be Mr. Robert Cassidy.

STATEMENT OF ROBERT C. CASSIDY, JR., GENERAL COUNSEL, OFFICE OF THE U.S. TRADE REPRESENTATIVE

Mr. CASSIDY. Thank you, Mr. Chairman.

I have a prepared statement which I request you to print in the record. I would like to summarize it very briefly.

As you know, Mr. Chairman, for many years the policy of the Federal Government has been to promote fair competition both domestically and internationally.

We have a number of statutes that have this policy goal as their objective. The principal statutes are our antitrust laws, most importantly, the Sherman Act, the antidumping law, and the countervailing duty law, which relate to international trade specifically.

These statutes are largely remedial in their purpose. That is to say, they do not provide private parties compensation. They are intended to cure any distortions in the competitive system.

However, the Sherman Act does provide that private parties can get compensation, treble damages, under certain circumstances.

There are also, in a number of cases, special remedies other than these general statutory provisions which are directed toward a peculiar problem where the Congress has determined that some competitive distortion is not otherwise appropriately remedied under the general statute.

One example of this is the treatment of patent infringement in international trade and the remedy is section 337 of the Tariff Act of 1930. There are a number of other examples of special narrow remedies which are in some cases supplementary to, and in some cases overlapping with, our general competitive statutes.

In the opinion of the Office of U.S. Trade Representative, our principal concern today should be to make certain that the major acts under which we regulate competition, dumping, countervailing, and antitrust, are consistent with each other and, more importantly, are both enforced by the Government and available to private parties on a basis which will result in a procompetitive environment overall.

We have a series of statutes that were enacted at different times. Some of them enforceable only by the Government, some of them can be invoked by private parties, some are civil, and some are criminal.

In some instances, the net result of the system has been not a fair, competitive environment, but a disruption of the competitive system. It is, I think, an appropriate time for the Congress to begin a review of this patchwork of major regulatory laws to make sure that they are consistent with each other.

Our principal goal in this exercise must be to promote competition. It must be to avoid reducing competition either through overzealous enforcement by Government or through manipulation by private parties whose principal objective is not fair competition, but to avoid competition.

With this general background, let me address some of the policy issues which are raised by S. 223, title V of S. 223.

At the time that this bill was introduced, which was more than 1 year ago, there were a number of reasons laid out in the extremely detailed statement that Senator Danforth included in the Congressional Record explaining the need for the bill in general and specifically for the title V amendments to the 1916 Antidumping Act.

One of these reasons was that the then-Antidumping Act of 1921 was a deterrent only. It provided no compensation for individuals.

Second, that the then-Antidumping Act of 1921 did not work effectively.

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Third, that the Sherman Act did not apply to the kinds of practices about which Senator Danforth and a number of other Members of the Senate were concerned.

I think it is now appropriate, since we have had a change in circumstances, to take a look at these reasons to see if they are still valid.

First of all, the 1916 act—and for that matter, the Sherman Act to the extent it provides for treble damages—are clearly a deterrent to predatory dumping.

The Antidumping Act, in its current form, and in its previous form, of course, is not compensatory. However, under both the new and the old law it is possible to provide for retroactive collection of dumping duties and, in a sense, to compensate companies for losses that they have suffered from some anticompetitive prices. The question is essentially whether there is some advantage to direct compensation over retroactive application of the traditional dumping duties.

Second, the Sherman Act does apply, in the opinion of the U.S. Department of Justice, to the kind of predatory dumping to which the current 1916 act is directed, and to which Senator Danforth's amendments would apply. Is it necessary that we make any significant changes in the 1916 act? Would we be adding anything to the current statutory complex covering these practices?

I am not able, since I am not an antitrust technician, to give it the definitive answer to this. However, it does appear, based on a review that was carried out by the Justice Department, that there is some serious questions whether or not we need an additional statute on the books.

The next point which was raised by Senator Danforth was that the Antidumping Act of 1921 did not work effectively. As this committee knows, perhaps better than any other congressional committee, that was, in fact, a common perception of the situation up until July of last year. However, as a result of a major effort by this committee, we have, as of January 1 of this year, an entirely new dumping law. Major changes under the new law are a much shorter investigatory period and a much greater access to judicial review for parties to administrative investigation.

Senator RIBICOFF. What I would be concerned with, how does the Danforth proposal impact on the provisions of the Trade Agreement Act of 1979?

Mr. CASSIDY. Well, my guess is—and Senator Danforth can answer this better than I can—that at the time he introduced this bill he felt that the Antidumping Act of 1921 was not providing timely relief, investigations took too long, and one could not predict the outcome of a case by looking at precedents.

I assume that his intention in modifying the 1916 act was to provide more rapid relief to private parties and second to make relief in some sense more certain—that is to say it would be determined by the courts rather than administrators and therefore decisions would be under considerably more discipline as a result of the judicial process.

In light of the enactment of the Trade Agreements Act of 1979, I am not sure that either of those two objections are as compelling as they may have been last year. We now have a much more rapid

administrative system under the new law and decisions are subject to judicial review.

Senator RIBICOFF. Is there anything in the proposal that would countervene the MTN agreements?

Mr. CASSIDY. That is a question which we have been studying at some length. The Antidumping Code, as it was approved by the Congress last year, prohibits the imposition of antidumping duties by any means other than procedures that are consistent with the code. For our domestic purposes, those procedures are the new dumping law.

The question really is, would treble damages, and for that matter any damages single or treble be antidumping duties, or something other than antidumping duties? It is almost a certainty that our trading partners would maintain in the GATT that the damages, whether single or treble, would be some form of dumping duties. There are certainly arguments which could be made to rebut this view. One could argue that treble damages are not dumping duties, are not designed to offset dumping, but are designed to penalize dumping.

However, I think it is almost inevitable that if we were to have a private remedy with damages, regardless of whether they are in the nature of a penalty or in the nature of compensation, that the other parties to the Antidumping Code would allege that they are the imposition of dumping duties in violation of the code.

Senator RIBICOFF. What happens? We are all learning this. We really have had no experience.

What if we were in violation of the code by the passage of such law? What retaliatory measures, or what remedies would there be, on behalf of our trading partners?

Mr. CASSIDY. First of all, we would have to have a case where we imposed a penalty under the law. If we did that, then the foreign government could challenge us under the code.

What they would say in essence, is that we are imposing a dumping duty under procedures not consistent with the code. If we could not convince them that that was not the case, they would presumably ask for a panel under the code which would hear oral arguments and recommend a solution to the case.

If we lost in that panel dispute, and if the committee of signators to the code directed us to change our system, and if we refused to change our system, then we would either be required to compensate the country which was injured through tariff reductions or by some other means, or alternatively the country could retaliate against us. They could raise duties on some comparable amount of trade, comparable to the amount of trade with respect to which we had imposed the penalty under the 1916 act.

Senator RIBICOFF. The 1979 act was very careful to point out that nothing in of MTN agreements contravened the U.S. statute.

Mr. CASSIDY. That is correct.

Senator RIBICOFF. Would there be a countervention of U.S. statutes in the Danforth proposal?

Mr. CASSIDY. The act says that the international agreements which were approved in the Trade Agreements Act do not change any U.S. statute except as explicitly provided for in that act.

That means, for example, that, in the opinion of the Congress, the 1916 act, is not in violation of the code because it was not change in the 1979 act. That does not mean, however, that a GATT panel could not determine that a penalty under the 1916 act is in violation of the code.

Senator RIBICOFF. In other words, we are in a situation that there has to be a great deal of law and procedures and develop from future experiences when this gets going.

Mr. CASSIDY. Basically yes, insofar as the GATT system is concerned. We do not know.

Senator RIBICOFF. I am curious. You were on this side of the bench and now you are on the other side of the bench in the executive branch.

When do you see the MTN agreements starting to have an effect or an impact in the establishment of procedures that have meaning? Are we still in the talking stage? The discussion stage?

When does it become effective, for all practical purposes?

Mr. CASSIDY. For practical purposes, in the sense of the existence of a system which could function if somebody brought in a complaint, the system is established now. There are lists of panelists, and code committees have been created, chairmen have been selected.

However, as of today, we have not had yet any complaint brought in under any of the new agreements.

Senator RIBICOFF. By anyone against anyone?

Mr. CASSIDY. By anyone against anyone. We have a number of disputes now running in Geneva, but they are all disputes that originated before the beginning of this year and they will all be handled under the traditional GATT dispute settlement system. We do not yet have a complaint from any country, either the United States or any other country, under any of the new codes.

I suspect that we will see some before the year is out.

Senator RIBICOFF. Senator Danforth, do you have any questions?

Senator DANFORTH. Yes; thank you, Mr. Chairman.

With respect to existing statutes, laws now on the books, are you familiar with the Wilson Tariff Act?

Mr. CASSIDY. I have read it once upon a time; yes. I am not an authority on it.

Senator DANFORTH. Right.

Is it fair to say that probably nobody is an authority on it?

Mr. CASSIDY. I think that is fair.

Senator DANFORTH. It is a statute that is not in use, that it is not a relevant factor in regularizing international trade?

Mr. CASSIDY. It is one of a number of artifacts in our trade statutes; yes.

Senator DANFORTH. Yes.

Is it fair to say that the section 1 of the Sherman Act which prohibits combinations and conspiracies in restraint of trade is not applicable to dumping because a combination or conspiracy is a multiparty act?

Mr. CASSIDY. Well, not necessarily accurate. It is unlikely you would find a cartel arrangement in the process of dumping these days, at least one that you could prove. It is not theoretically impossible.

Senator DANFORTH. The way dumping works, it is really not a statute that you would seize on and write a law review article about saying, "Aha, section 1 of the Sherman Act is something that is relevant in dealing with dumping?"

Mr. CASSIDY. Only if you found a group of foreign companies that were sufficiently unsophisticated that they met with each other and decided to dump.

Senator DANFORTH. Yes.

Senator RIBICOFF. If you would yield, let us say you had the European Community that acts as a group and you had at the same time a Belgian steel company, a German steel company, a French steel company together having a process or an understanding where they are shipping steel into the United States.

Would that then come under Wilson?

Mr. CASSIDY. It could come under the Sherman Act.

Senator RIBICOFF. If they were dumping at the same time.

Senator DANFORTH. In the garden-variety case of dumping?

Mr. CASSIDY. The garden-variety case of dumping is company-by-company decisionmaking apparently.

Senator DANFORTH. Therefore, section 1 would not be applicable to that?

Mr. CASSIDY. Right.

Senator DANFORTH. Now, with respect to section 2 of the Sherman Act, section 2 of the Sherman Act requires specific intent to monopolize and the burden is on the plaintiff to prove specific intent to monopolize.

Is it not likely that section 2, because of rquiring specific intent to monopolize that it would probably not be likely to, or really has not been in the past, an adequate tool to deal with dumping under the antitrust laws?

Mr. CASSIDY. The Justice Department informs me is that it is their opinion that section 2 is applicable to the kind of behavior to which the 1916 act and your bill are addressed. I think this is something you probably should require for your own record, since I am not an antitrust expert, but I spent a good deal of time talking to them.

It is their opinion.

Senator DANFORTH. Yes.

Has it been widely used?

Mr. CASSIDY. As far as I know it has not been widely used.

Senator DANFORTH. I would think that it would be fairly rare, would you not, not just the effective monopolization but the specific intent to monopolize could be proven, that a plaintiff could bear that burden?

Mr. CASSIDY. Intent is always very difficult to prove, obviously, but there is the other aspect, the larger issue, that is that companies usually have limited resources and they have to select where they are going to pay their lawyer's fees. In many cases, I suspect that they have chosen to pursue the dumping remedy as opposed to the antitrust remedy even under the old law. It was likely they would get an answer one way or the other more rapidly under the dumping procedure than under the antitrust law.

Senator DANFORTH. Would it be reasonable to assume that the requirement approving specific intent in a section 2 case would be

a strong deterrent to proceeding under that remedy, if you were the company that felt victimized by dumping?

Mr. CASSIDY. It is always difficult to prove; yes.

Senator DANFORTH. Now, that leaves the 1916 Predatory Dumping Act. Would it be a fair characterization of that act that it is wordy uses, descriptions of dumping that really are not the present terms of art, that it has been overtaking in the definition of dumping by the 1921 act and that it, too, is something of an artifact of the past?

I think it has been used once.

Mr. CASSIDY. I think it has been used more than once in civil cases. It has never been used at all in criminal cases, but it has been used very rarely, at any rate.

I agree with what you say. If you assume that the 1916 act is, or was in 1916, intended to be directed at the same kind of practice that we now contemplate under the antidumping laws. There are differences between the approaches.

Senator DANFORTH. I am not quite sure I followed that.

Is it your view that the 1916 Predatory Dumping Act as it now exists is an effective tool which is available for policing and dumping?

Mr. CASSIDY. The answer to that is it has not been used. It may be that there are more effective tools that were used in its place.

Senator DANFORTH. If I were to suggest that it is not an effective tool, would you make a strong argument in contradiction?

Mr. CASSIDY. Since it has not been used, I would have trouble with that, although it could be the interrorum effect that is so great that people do not need to use it. I do not know.

Senator DANFORTH. What is your guess?

Mr. CASSIDY. My guess is that it is probably not too effective.

Senator DANFORTH. Yes.

The point of the 1916 act, as I understand it, is, among other things, to provide for treble damage relief in the case of domestic industries which are injured. Is that not correct?

Mr. CASSIDY. Yes.

Senator DANFORTH. Let's turn to the Robinson-Patman Act. The Robinson-Patman Act is an act which is designed to deter and provide remedies against price discrimination.

Is it correct to say that dumping is a form of price discrimination?

Mr. CASSIDY. I cannot speak—I do not know whether it is a form of Robinson-Patman price discrimination. It is obviously a form of the price discrimination in the generic sense.

Senator DANFORTH. That is what it is selling on the market at a different price than what a product is sold for in another market?

Mr. CASSIDY. Right.

Senator DANFORTH. It is my understanding that the Robinson-Patman Act is not available in the case of international trade because it has been held, I believe by a court, that both the discriminatory sale and the sale against which it is measured must be in a domestic market.

Is that right?

Mr. CASSIDY. I understand the same thing.

Senator DANFORTH. Yes.

The purpose of this bill is to try to extend the same sort of philosophy and the same sort of procedure available under Robinson-Patman to the international form of price discrimination which is dumping?

Mr. CASSIDY. Yes.

Senator DANFORTH. I was not here to hear whether or not the administration is supportive of this very excellent effort.

Mr. CASSIDY. I opened up by complimenting your excellent introductory statement in January 1979 when you introduced the bill, which was very useful to us.

As far as the USTR is concerned, our principal worry about this bill is that we are presently confronted with a statutory complex which includes the basic antitrust laws, principally the Sherman Act, the Robinson-Patman Act, the antidumping law, the countervailing law, and a number of other provisions.

What we find in the daily application of these laws, the major statutes, ignoring some of the ones that are directed toward narrower types of practice such as patent infringement or predatory dumping, that even the major statutes are overlapping and potentially, at least, inconsistent with each other, and that we would, at this time, be most interested in focusing our attention on trying to bring some compatibility to the major statutory framework.

Senator DANFORTH. In that connection, would not an amendment to the 1916 act which brought its definition of dumping into line with the 1921 act's definition of dumping accomplish exactly that?

Mr. CASSIDY. It would on the one hand and it might not on the other. On the one hand, it is nice to have consistent definitions of dumping if you are looking for remedies to dumping.

On the other hand, if you have one dumping remedy which was administered by the Commerce Department under their regime and another which was administered in courts, where, for example, the very technical adjustments to foreign market value, which must be made under the current definitions, have got to be litigated out by the parties. You would not necessarily, but you could end up with inconsistent results, depending on what forum you happen to be in. You could have a court coming up with one definition of a margin and you could get the Commerce Department coming up with another definition.

Theoretically it would be an improvement to have the same definition. Whether, in practice, that theoretical improvement would be borne out is another issue.

Senator DANFORTH. Every law student is taught never to ask a witness a question when you do not know the answer. I have learned in asking administration questions that that adage is always true.

Thank you.

Senator RIBICOFF. Thank you, Senator.

Senator Heinz, do you have any questions?

Senator HEINZ. Yes, Mr. Chairman.

First, I would like to ask unanimous consent that my opening statement be made a part of the record at the appropriate point.

Senator RIBICOFF. Without objection.

[The prepared statement of Senator Heinz follows:]

PREPARED STATEMENT OF SENATOR JOHN HEINZ

Mr. Chairman, these hearings represent an important step forward in the Committee's consideration of further trade reform measures. Contrary to what may be the prevailing opinion, the Trade Agreements Act of 1979, last year's legislation implementing the results of the Multilateral Trade Negotiations, did not permanently resolve every trade problem we have.

In fact, the Congress in developing that legislation left a number of issues for further consideration. Most significant among these "left-overs" are first, revisions of sections 201 and 203 of the Trade Act of 1974—the escape clause provisions—omitted last year because of the MTN's failure to reach agreement on a safeguards code; and second, a more coherent means of dealing with dumping by nonmarket economies, the subject of legislation recently introduced by Senator Roth and myself.

Another significant issue not dealt with last year is the subject of today's hearings: the 1916 Antidumping Act and the proposed amendments to it included in S. 223, Senator Danforth's major trade bill of last year.

As a cosponsor of S. 223, I certainly endorse this hearing and hope it will lead to markup of the bill. On a broader level, Senator Danforth's proposal is designed to deal with the problem of dumping, in this case predatory dumping, which I continue to believe we have not adequately dealt with through last year's rewrite of the 1921 Antidumping Act.

The simple fact is that there are both governments and industries elsewhere in the world which undertake a variety of unfair trade practices, including dumping, for short-term domestic policy reasons. These practices are the antithesis of free trade. They represent efforts to increase unfairly employment or income at the expense of American workers, and they should be stopped.

Senator Danforth's amendments to the 1916 Antidumping Act will give domestic industries an additional resource to fight such predatory tactics and for that reason deserves our serious consideration.

Senator HEINZ. Mr. Cassidy, welcome back to the committee.

Mr. CASSIDY. Thank you, sir.

Senator HEINZ. I understand that today you are speaking on behalf of the administration.

Mr. CASSIDY. I am speaking on behalf of USTR today.

Senator HEINZ. Representing the administration policy on this issue?

Mr. CASSIDY. Representing the USTR today.

Senator RIBICOFF. I think it is only fair to state that a little birdy told me that the administration has not made up its mind on this bill.

Senator HEINZ. That birdy must be so tired of carrying that message back and forth. That birdy is going to be a dead duck.

Senator RIBICOFF. I would say that we would all have opportunities to submit to Mr. Cassidy in writing some of our questions and give him an opportunity to use his own pigeon-transfer.

Senator HEINZ. Mr. Chairman, I appreciate that.

I just have one or two brief inquiries I wish to make of Mr. Cassidy. I know Mr. Cassidy is the chicken.

Mr. Cassidy, does STR handle interagency policy disputes under the new reorganization plan?

Are you a traffic cop on that?

Mr. CASSIDY. That is our responsibility in the trade policy reorganization; yes.

Senator HEINZ. How does STR make sure that the administration, since you do have that responsibility, speaks with one voice on trade policy? Do you clear testimony from other agencies?

Mr. CASSIDY. I will give you some case examples. We are still establishing the process. For example, next week we are to appear before the Ways and Means Committee to present the administra-

tion's position on automobile imports from Japan, a major issue that confronts us right now. We have established an interagency task force which includes the Department of Energy and the Department of Transportation and the Council of Economic Advisers and virtually everybody else who is engaged in this issue one way or the other. Testimony which has already been drafted is now moving through this committee for approval by the various agencies involved.

It still ultimately must go through the Office of Management and Budget, as does all testimony on behalf of the administration. However, our role is really to take some of the coordinating burden at the technical level away from OMB because they really do not have the time, nor the expertise, particularly in trade policy.

Senator HEINZ. In a sense, you are their subcontractor?

Mr. CASSIDY. We are their subcontractor, precisely.

Senator HEINZ. Did the STR know about the Justice Department brief on investigations, 731TA-1-2 antidumping?

Mr. CASSIDY. The injury memorandum?

Senator HEINZ. In the matter of spun acrylic yarn from Germany.

Mr. CASSIDY. It was delivered to me at the same time it was delivered to the ITC.

Senator HEINZ. Does the STR support the contents of the brief?

Mr. CASSIDY. No.

Senator HEINZ. Am I correct in assuming, since you state it was delivered to you, and the ITC on the same day, that you were not aware of it prior to its submission?

Mr. CASSIDY. That is correct.

Senator HEINZ. Since you are supposed to be the clearinghouse, at least on that, what efforts are underway to make sure that does not happen again?

Mr. CASSIDY. We are the clearinghouse for testimony before Congress. Directing the Antitrust Division to submit or not to submit its opinion in a particular piece of litigation is something which only the Attorney General and the President have authority to do. We have discussed this question with the Antitrust Division at some length, but our power there is really only of moral suasion.

Senator HEINZ. Well, if you have read the brief, it has very little to do with antitrust policy. It is an attempt to reinterpret the legislation which this committee and the Ways and Means Committee helped write, and I find it inconceivable, frankly, that on a legislative matter having nothing to do with antitrust that the administration would not at least feel morally bound to clear it through you.

Do you have any comment on that?

Mr. CASSIDY. As I have said, we have had a long series of discussions with the Antitrust Division about this particular effort on their part. As you are well aware, essentially they are continuing the debate which they began more than 1 year ago. They have never conceded the point, although, in fact, Congress has spoken, the legislative history is clear, and that is the way the Commerce Department will enforce the law. Presumably the ITC will follow that legislative history also.

Senator HEINZ. I was very pleased that the ITC, just the day before yesterday, spoke unanimously, a vote of five to nothing, in finding for the petitioners, and quite correctly rejected the attempted intervention by the Justice Department.

Theirs was absolutely without any foundation. I am delighted with that vote.

Mr. Chairman, I would ask that a letter that I sent to Mr. Civiletti on his Department's brief dated February 14 be a part of the record.

Senator RIBICOFF. Without objection.

[The material referred to follows:]

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, D.C., February 14, 1980.

Hon. BENJAMIN R. CIVILETTI,
Department of Justice,
Washington, D.C.

DEAR MR. CIVILETTI: I have recently received a copy of the Justice Department's post-hearing brief before the International Trade Commission on Investigation Nos. 731-TA-1-2, spun acrylic yarn from Japan and Italy, and I must say I am appalled at the distortion of Congressional intent and legislative history contained in that brief.

Its basic premise is that, "* * * 'material injury' standard provided for by the Trade Agreements Act of 1979 requires the showing of a higher degree of harm than did the mere 'injury' standard of the superseded Antidumping Act of 1921."

This assertion is simply untrue, and the accompanying selective quotations from the House and Senate committee reports only serve to distort the issue further. Rather than supply additional quotes, I would refer you to both the entire relevant sections of the House and Senate reports as well as extended dialogue on the floor between various senators and the managers of the bill (Congressional Record, July 23, 1979). These documents leave no doubt as to the intent of both House and Senate in writing this legislation: that the injury test adopted in the Trade Agreements Act of 1979 is not to be substantively different than the test previously applied by the International Trade Commission under the Antidumping Act of 1921. If there is any doubt on that point, consulting the record of the closed sessions, particularly the conference between House and Senate, will clarify the issue and also demonstrate that this was the Administration's position as well, as evidenced by the comments of Ambassador Strauss.

I am also particularly distressed at assertions made on page 7 of your brief relating to the word "or" in the term "inconsequential, unimportant, or immaterial * * *." On this point your brief explicitly contradicts an exchange on the Senate floor between Senator Ribicoff, the bill's manager, and myself (Congressional Record, July 23, 1979, p. S10311) which makes clear that "or" in fact means "or" not "and" as your brief implies.

The question of material injury was one of the most difficult and controversial confronting the two committees when this legislation was developed. It was ultimately resolved in a matter satisfactory to both the Administration and the Congress by clarifying that the test had not changed over that applied under the Antidumping Act of 1921. To state otherwise is inaccurate, a disservice to the interested public, and a rejection of your own Administration's public position on this issue. I would hope that you would caution your staff to act more responsibly in the future.

Sincerely,

JOHN HEINZ.

Senator RIBICOFF. Thank you very much, Mr. Cassidy. Different members of the committee will have questions for you that they will submit and you will return them.

Mr. CASSIDY. We will respond to them.

[The prepared statement of Mr. Cassidy follows:]

TESTIMONY OF ROBERT C. CASSIDY, JR., GENERAL COUNSEL, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Mr. Chairman, it is a pleasure to be here today to talk about possible amendments to the so-called 1916 Antidumping Act, as well as Title V of S. 223 which would amend that Act.

The Office of the USTR believes strongly that international competition should be fair. To this end, the President has stated his commitment to vigorous enforcement of the newly enacted Title VII of the Tariff Act of 1930 relating to countervailing and antidumping duties.

At the same time, the USTR is concerned about the possibility of establishing barriers to trade as the result of our efforts to promote fair trade. When a number of domestic statutes enacted at different times and for different reasons regulate, penalize, or prohibit the same practice in international trade, the cumulative impact of these statutes may not be fair competition. The impact may be the total disruption of trade. This result is particularly troublesome if the statutes can be manipulated by private parties whose objective is not fair competition but to avoid competition.

The various statutes that relate to unfair competition must be viewed, therefore, in an overall context. Our statutory regime, taken as a whole, must promote fair competition and not lend itself to an anticompetitive strategy by a particular party. The basic statutes promoting the policy of fair international trade are the countervailing duty law, the antidumping law, and the antitrust laws. Only unusual problems that require a unique remedy should be singled out for a special statutory remedy beyond these basic laws.

Patent infringement in import trade is an example of a special problem which has a special remedy under section 337 of the Tariff Act of 1930. Dumping which is intended to destroy or injure a domestic industry is another special problem for which there is a special remedy under the 1916 Antidumping Act. S. 223 would amend that Act. This morning I would like to discuss a number of considerations which you should keep in mind while reviewing this bill.

Relationship to international obligations

By adhering to the International Antidumping Code, the United States has agreed that antidumping duties cannot be imposed except under the procedures set forth in that Code. It would be in conflict with these international obligations to provide for a remedy which includes the imposition of antidumping duties through any other form of legislation.

Although it is possible to argue that the relief envisioned under the 1916 Act may be viewed as something other than antidumping duties, it is almost certain that our trading partners would not accept this view readily. The result of remedies imposed under the 1916 Act, in its current form or revised, would be international disputes over our compliance with our obligations under the new Antidumping Code approved by Congress last year.

Relationship between the antidumping law and the 1916 act

As a result of a major effort by this Committee, the Trade Agreements Act of 1979 contains a completely revised antidumping law. Under the new statute the period for an antidumping investigation is significantly reduced and the parties to a dumping proceeding are given increased access to the courts to review administrative actions.

It is too early to tell what the impact of these changes will have. However, it seems appropriate that some time should be given to evaluate these changes in the antidumping law before undertaking to make amendments of a broad nature in the 1916 Act. It may well be that some of the perceived special problems that the amendments in S. 223 are intended to address may be disposed of satisfactorily under the new law.

Having said this, let me raise a number of issues relating to the relationship between the 1916 Act and the antidumping law. The antidumping law addresses injury to an industry or injury to an industry on a regional basis. A small domestic company may not be able to establish that the industry of which it is a part is being injured by international predatory dumping. If a special remedy is necessary, it should be directed toward this kind of situation: A form of anticompetitive practice which may not otherwise be reachable.

It is our belief that any party that believes that dumping on a large scale is occurring must file a petition under the antidumping law in Title VII of the Tariff Act of 1930. Indeed, if the definition of dumping is to be consistently applied, resort to this type of procedure is necessary to insure consistency in results. Neither the

61-219 O - 80 - 2

Antidumping Act of 1921 or its successor statute is punitive. It is intended to correct a form of unfair international competition which has been found to exist by focusing on some representative period of time. To the extent that an exporter can correct its pricing practices which have caused injury to the U.S. industry, then no dumping duties are assessed prospectively.

Under the 1916 Act a U.S. party can obtain compensation for a past form of unfair competitive practice. Similar compensation is available to a private party under our antitrust laws. The question then becomes whether the anticompetitive practices to which the amendments in S. 223 are directed can be remedied under existing law. If the antitrust laws do provide a remedy, then there may be no need for the special remedy envisioned in S. 223.

The major issue is whether or not there should continue to be an intent required under the 1916 Act or whether just the effect of dumping should be sufficient to allow a party to recover damages. In Title V of S. 223, the penal provision of the 1916 Antidumping Act would be eliminated. The principal thrust of Title V is to provide a private party relief when it is injured as a result of dumping. Furthermore, dumping would be defined to approximate the definition in the antidumping law, now Title VII of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979.

Providing for treble damages where the injury occurs simply because of inadvertent dumping would be overly harsh. As this Committee is fully aware, the mechanics of computing a dumping margin are highly complicated. It is doubtful whether many manufacturers in a foreign country can know whether dumping, in the technical sense, is occurring. Indeed, even we don't know until an administrative investigation by the Commerce Department and the International Trade Commission is completed. If we determine that dumping has occurred, then dumping duties are imposed to restore fair competition. While private parties get no monetary benefit, they do benefit from the revised import prices of their foreign competitors prospectively and, in "critical circumstances", retroactively.

We believe, therefore, that the element of intent should be retained before damages are assessed for dumping. This would continue to distinguish the remedy under the 1916 Act from dumping duties and limit the remedy to special cases where the object of the foreign practice is to destroy or injure a domestic injury. This would be both compensatory as well as have a deterrent effect to any foreign manufacturer who was considering predatory dumping in the U.S. market.

Conclusion

The Office of the USTR is not opposed to continuing a form of relief for U.S. companies that are subjected to the unfair competitive practices addressed by the 1916 Act. We recommend that this Subcommittee examine existing administrative antidumping and antitrust laws, apart from the 1916 Antidumping Act to determine the extent to which the special problems to which the 1916 Act is addressed are now adequately covered by those laws. We believe this may be the case. If the Committee concludes that some practices cannot be reached under Title VII of the Tariff Act of 1930 or the antitrust laws, we recommend that any new remedy be narrowly drawn to avoid conflicts with our international obligations and to prevent private parties from using our fair trade statutes to avoid rather than to promote competition.

Senator RIBICOFF. Peter Buck Feller and Charles V. Verrell and Gary N. Horlick.

STATEMENT OF PETER BUCK FELLER, ESQ., McCLURE & TROTTER, ACCOMPANIED BY CHARLES OWEN VERRILL, JR., ESQ., PATTON, BOGGS & BLOW; AND GARY HORLICK, ESQ., STEPTOE & JOHNSON, ON BEHALF OF THE AD HOC LABOR-INDUSTRY TRADE COMMISSION

Mr. FELLER. Thank you, Mr. Chairman.

My name is Peter Buck Feller. I am a trade attorney here in town. With me is Mr. Charles Verrill also a trade attorney with another law firm, and Mr. Horlick of Steptoe & Johnson who will be with us momentarily.

We are here on behalf of an organization called the Ad Hoc Labor-Industry Trade Coalition. The members of the organization have a common interest in seeing to it, as much as we can, that the

laws of the United States dealing with unfair trade practices are improved and strengthened.

We heartily support the objectives of Senator Danforth's proposed amendments to section 801 of the Revenue Act of 1916. It seems clear that such amendments are long overdue.

The reason is that in its some 64-year history no relief has ever been forthcoming under the 1916 Antidumping Act.

Senator RIBICOFF. I am curious. Since you gentlemen are active practitioners in this field, have you ever tried?

Mr. FELLER. I think Mr. Verrill has if I could turn the microphone to him.

Senator RIBICOFF. Have you ever tried? What happened?

Mr. VERRILL. We did bring a case under the 1916 act in the case of golf carts from Poland. There were a number of other allegations and the litigation is still pending in the District Court of Delaware on other issues.

With respect to the 1916 act, the court held that in the case of a controlled economy, the 1916 act could not be utilized.

Mr. FELLER. As we see it, the reason for this difficulty with the present law is the required element of an intent to destroy or injure an American industry or to monopolize or restrain trade. It is extremely difficult, if not impossible, to meet.

Remember, we are talking about gathering information from foreign sources and foreign countries generally as distinguished from here in the United States and that in itself, causes a great burden.

The result is we think that there is rather an important gap in the law dealing with this type of unfair trade practice. There is really no practical way that domestic firms, or industries, who are injured by dumping can be compensated for that injury.

Such a firm or industry under the administrative dumping act can get a prospective remedy but it cannot get a remedy for past injury.

One of the reasons why this is a significant problem, and a problem that we think ought to be dealt with, is that there may be a significant time lag before a domestic firm or industry realizes, or gets the precise information, needed to determine that it is a victim of dumping. It may be several years before the American firm or industry is able to detect that it is, in fact a victim of dumping by a foreign producer.

He may know that the prices are low, the imports are coming in at low prices, but that does not mean that there is price discrimination going on.

He must determine information about the prices in the home market of the exporter or third country markets of that exporter and that process can be time-consuming, expensive, and very difficult.

The impact for smaller industries, fragmented industries in the United States or less sophisticated industries, can be quite onerous. In the meantime, before he is able to discover that dumping is going on, plants may be closing, workers laid off, reinvestment put off and so forth.

There are 33 members of our coalition and there are three basic points that we all agree on. On some details, there may be some disagreement within the group.

The first point is that we would like to see the specific intent requirement dropped from the 1916 act in favor of a much lower standard of culpability, possibly something like whether or not the foreign producer or exporter knew, or had reason to know, that it was dumping its product in the U.S. market.

Senator RIBICOFF. From your experiences, has there ever been any question that the offending party who is doing the dumping knows or does not know what is taking place?

Mr. FELLER. We think that there are a number of circumstances where the foreign party is really innocent, that there are factors beyond his control which may make the dumping technical or inadvertent.

For example, there could be a sudden fluctuation in the exchange rates after an export price is agreed upon, thus accidentally putting the exporter in a dumping posture. In that kind of a situation, he would not know that he is dumping.

No. 2, we would like to see the basic character of the law changed from one that emphasizes punishment, such as treble damages, to one that is primarily compensatory in nature. In other words, we are saying that the damages provided for private party litigation should be the actual damages incurred by a domestic company as distinguished from treble damages.

Third, the current statute talks about prices substantially less than the actual market value of the merchandise concerned and talks also about a systematic pattern of importing with such low prices.

We do not really know what those terms mean, and we really think that it would be beneficial if the determination of price consideration or dumping under the revised 1916 act would be the same as under the administrative antidumping laws as currently applied.

There are a number of other details that we also have some thoughts on, particularly the question of whether injunction is an appropriate relief.

As I understand it, normally an injunction is an extraordinary remedy not thought to be appropriate where there is an adequate remedy at law. A statute that is based on compensation for actual damages, Mr. Chairman, we would think would provide an adequate remedy in law, and therefore injunctive relief would not be appropriate.

Finally, on the question of consistency or inconsistency with the GATT, we on this panel and others within the coalition, have discussed the matter and we see no conflict between the international obligations of the United States in the revised 1916 act along these lines.

Senator RIBICOFF. Do you have a legal memorandum on that point?

Mr. FELLER. We do not, sir, but we would be glad to prepare one for you.

Senator RIBICOFF. I would like to get your position on that, and if there are any witnesses that represent the opposite point of view,

we would like to see if possible your presentation of whether this was, or was not, in conflict with the multilateral trade agreement.

Mr. FELLER. All right, sir.

I would like to turn over the microphone, if I might, to Mr. Verrill for some additional thoughts, and then to Mr. Horlick.

Mr. VERRILL. Mr. Chairman, I would like to emphasize that the position of the coalition which we are urging today is that damages under any amendments to the 1916 act be limited to the actual compensation from injury due to dumping except possibly in egregious cases.

It is our view that while treble damages may play an important deterrent role in antitrust cases, it is our view that compensation for actual damages is more consistent with the Nation's trade policy and the import relief provisions of the 1974 and 1979 trade acts.

In exchange for this limitation on damages, the coalition would urge that the provisions in the current law and in some of the amendatory language that has been prepared relating to the lessening of competition on the restraint of trade as a requirement for relief be eliminated and that, instead, the remedy be made available to any person who is injured by less than fair value selling, provided that the defendant can be shown to have known, or should have known, that the less than fair value selling was actually occurring.

Mr. HORLICK. I would first emphasize the need to effectively compensate for the dumping which occurs prior to the conclusion of the administrative proceeding, which even under the faster time limits can run up to a year. Where this can be a real problem for many domestic producers is a case where a sudden large volume of sale by a foreign producer can grab off a substantial market share before an administrative proceeding can end.

The foreign producer, having established itself, can then raise its prices to avoid dumping duties.

Second, the 1916 act, as amended, should make very careful use of the administrative decisions, if any, from related dumping cases. With respect to final Commerce Department decisions as to the existence of dumping, essentially the Commerce Department, it has to rely, to a large extent, on estimates or allocations of cost or pricing and that these decisions, therefore, should only establish a prima facie case if they are positive as to the existence of dumping, which the defendant could rebut.

The actual margins in the dumping investigation are somewhat more speculative and it should be given no weight, or only be given weight if the defendant refuses to supply any information.

The margins calculating the duty assessment phase are much more precise and quite possibly should be considered as binding on the court unless the defendant can show that those margins are not supported by substantial evidence on the record, or some similar standard.

I see that our time is up.

Senator RIBICOFF. Thank you.

Senator Danforth?

Senator DANFORTH. Are you gentlemen familiar with the Robinson-Patman Act, how it works and the theory behind it?

Mr. FELLER. Yes, we are.

Senator DANFORTH. Could you compare the situation under which Robinson-Patman comes into play and the dumping situation and then describe the remedies available under Robinson-Patman?

Mr. FELLER. I think it would be appropriate for Mr. Verrill particularly to answer that question, Senator.

Mr. VERRILL. I will make an effort.

As I understand it, the basic thrust of the Robinson-Patman Act is, that in any section of the country, a seller should not discriminate in price on any product sold to a purchaser who is in competition with another purchaser.

The concept, essentially, is to avoid price discrimination in markets between competing customers.

Senator DANFORTH. That is the 1916 act and what this bill is designed to address internationally. Is that correct?

Mr. VERRILL. As I see it.

Senator DANFORTH. In the Robinson-Patman Act, the domestic version of price discrimination, can that act be enforced by the Department of Justice?

Mr. VERRILL. Yes, it can, although to my knowledge, no cases have been brought in the last 5 or 6 years.

Senator DANFORTH. Like other antitrust laws, the Justice Department does have at least the power of enforcement?

Mr. VERRILL. That is correct.

Senator DANFORTH. Also under Robinson-Patman, is it possible for private parties to bring suit under the Robinson-Patman Act?

Mr. VERRILL. Yes. There is a treble damage remedy.

Senator DANFORTH. A treble damage remedy for private parties?

Mr. VERRILL. Yes, sir.

Senator DANFORTH. What is the theory behind providing private remedies for antitrust violations, including the Robinson-Patman violations?

Mr. VERRILL. It is my understanding that there are essentially two reasons. One is, of course, to provide a means of compensation to a person who is injured by a violation of the statutory provisions, and second, there is the deterrent effect of the statutory provision, of the prospect of private litigation. The treble damages provisions are designed, I suppose, to deter people from engaging in price discrimination.

Senator DANFORTH. It is said that every citizen is an attorney general. Is that not correct?

Mr. VERRILL. Yes, sir.

Senator DANFORTH. The theory of treble damages is to provide an incentive for the private sector for individuals or companies to file suit really in place of the Attorney General to enforce the same law?

Mr. VERRILL. Yes.

Senator DANFORTH. Now, would you describe the differing burdens of proof and burdens of going forward under the Robinson-Patman Act and the 1916 act?

Mr. VERRILL. Well, the plaintiff has the burden of proving the elements of the offense under the Robinson-Patman Act. The plain-

tiff would have to be able to demonstrate that there would be price discrimination, and so forth.

The defendant, of course, would have various defenses—the products were not the same, that the discount offered to one customer was because of a volume, the diference between the parties, and so forth.

Under the 1916 act there are a number of elements at present which must be proved.

Senator DANFORTH. If you could just generalize about the shift in the burden of going forward, that is what I am driving at.

Mr. VERRILL. I think the burden of going forward of the 1916 act is on the plaintiff all the way through, down to the very end where you have to demonstrate that the acts were done with the intent of destroying or injuring an industry in the United States, and so forth.

Senator DANFORTH. I cannot hear you very well.

What about under the Robinson-Patman Act? Does it ever shift under Robinson-Patman?

Mr. VERRILL. To the extent that there are affirmative defenses, yes.

Senator DANFORTH. If the plaintiff makes a prima facie showing of price discrimination under Robinson-Patman, does the burden of going forward shift?

Mr. VERRILL. Quite frankly, I do not know for certain.

Senator DANFORTH. I think it does.

I think then the defendant has to come forward himself and show that that discrimination is justified.

Mr. VERRILL. Yes.

Senator DANFORTH. A competitive disadvantage that he is at, or by different costs. There is some justification.

Mr. VERRILL. Yes, sir. I misunderstood the question. That is exactly right.

Senator DANFORTH. I may not have framed it artfully.

Mr. VERRILL. You did. I did not listen artfully.

Senator DANFORTH. That is the case under Robinson-Patman. The plaintiff makes the case that there is discrimination present and then the defendant goes forward with the burden of showing that that price discrimination is justified by one of the justifications provided in the law.

Mr. VERRILL. That is correct.

Senator DANFORTH. Is that so under the 1916 act?

I think it is not.

Mr. VERRILL. I would not think so. Looking at the burden which seems to be on the plaintiff and proving the elements——

Senator Danforth: The burden is on the plaintiff throughout in the 1916 act, is it not?

Mr. VERRILL. Yes, sir.

Senator DANFORTH. Now, then. In a price discrimination case, just a purely domestic price discrimination case under Robinson-Patman, would it not be easier for an attorney representing an injured party to make his case under Robinson-Patman domestically than it would be for an attorney for an injured party to make it under the 1916 act?

Mr. VERRILL. I think so, and I think there are added burdens of proof—not burdens of proof, but burdens of obtaining evidence under the 1916 act. So yes, I think the answer is correct.

Senator DANFORTH. Do any of you others have any comments?

Mr. HORLICK. Yes. One thing we note in your proposed amendments which we think is particularly useful in making for an effective remedy is this technique of shifting the burden of proof precisely because in these transnational cases, getting evidence is far more difficult.

As you gentlemen are undoubtedly aware, that is particularly true in cases with an antitrust aspect.

There is considerable and growing foreign resistance to supplying evidence from overseas and U.S. antitrust cases highlighted by the Westinghouse cases, but it is more general than that not limited to England.

Senator DANFORTH. Let me ask you this.

In Robinson-Patman, is it not fair to say that the availabiity of private causes of action is very important to the whole scheme of Robinson-Patman. Another shift of the burden of going forward is also very important to the whole scheme of things in Robinson-Patman.

Mr. HORLICK. I think that is a safe conclusion. To the extent that Robinson-Patman is effective, it is because it is available to private litigants without undue burden, not in the legal sense, but in the mechanical sense of obtaining evdence.

I think that burden would be far greater in trying to get evidence overseas in cases such as these. Some sort of burden shifting is necessary.

This interrelates somewhat with the dilution of treble damages. Treble damages will raise hackles overseas even more.

Senator RIBICOFF. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

Does not the existence of the treble damage provision have a very chilling effect under the Robinson-Patman and under the antidumping laws.

As I understand your proposals, you would restrict the remedy to the actual damages. It seems to me if we consider that dumping is a very serious matter—so serious that it has been considered a criminal offense under the 1916 act—but then eliminate the criminal effect of that, I would think that keeping the treble damages would be very salutory.

What is your answer to that?

Mr. FELLER. The treble damage has been in the law since 1916. That certainly has not deterred dumping.

Senator CHAFEE. Is that not because of the burden of proof has been so difficult. The difficulties of tryirg to collect evidence from a foreign company must be extremely onerous on the plaintiff.

Mr. FELLER. Yes, indeed, Senator, it is.

I think our thought was this, that we are really talking about a tradeoff between much easier access to a compensatory type of law versus a lower penalty, a less burdensome penalty, on the foreign producers.

Certainly it is easy to argue that, at the very least, anyone who is injured by a wrongful action be compensated and made whole.

The penalty aspect of it we thought, was in a sense a tradeoff for much easier access.

Senator CHAFEE. But the difficulty we are facing here is the existence of dumping. We believe it is flagrantly carried out and under the MTN, it is all prospective. The actions are going to take place. There is no compensation, and thus, we should move to strengthen the 1916 law. I think that the treble damages are very, very chilling on any kind of antitrust activities.

That, plus the criminal penalties, would police the area to a considerable extent.

Mr. FELLER. One of the things we suggested in our statement, Senator, touches that subject. As of now, treble damages are mandatory with the court if the appropriate findings are made. We had suggested possible consideration of retaining treble damages as a discretionary matter with the court to be applied in egregious types of cases, which could be defined in the statute.

Senator CHAFEE. I think that might make some sense. I am pleased that you are not opposed to the treble damages completely. That seems to make some sense.

Mr. VERRILL. One of the thoughts we had in mind here is that in cases involving treble damages the courts, in my experience at least, allow the defendants every conceivable latitude, because of the penalty, in establishing a defense of the case.

Senator CHAFEE. You notice that in the antitrust situations?

Mr. VERRILL. Yes, sir.

While the treble damage provision is a very desirable one, at the same time you have to accept the fact that it makes it extremely difficult to litigate.

Senator CHAFEE. Because they are mandatory?

Mr. VERRILL. Yes.

Senator CHAFEE. I think your proposal makes considerable sense. Thank you, Mr. Chairman.

Senator RIBICOFF. Senator Bradley?

Senator BRADLEY. Thank you, Mr. Chairman.

I would like for one of these gentlemen, or all of them, to explain to me why, in your judgment, antidumping standards under this proposal would not have inflationary consequences.

Mr. FELLER. Quite frankly, Senator Bradley, we have not approached it or considered that in our thoughts on this. We were trying to come up with ways to deal with what we perceive as a real problem and that is dumping that causes injury where there is no compensatory provision in the current law, at least not an effective one.

I suppose that one could say that dumping itself is a counterinflationary activity that, by its nature, lowers prices for imported products. That might be true in the short run. I think the traditional theory is, and it is one that I believe in, is that what dumping may result in is driving out domestic competition, When a dominant position is established in the domestic market by a foreign producer, all of those losses incurred during the period of dumping could be recouped with jacked up prices.

Ultimately, I think it goes the other way.

Senator BRADLEY. Following up on Sentor Chafee's question, to what extent do you feel that allowing a lower standard of proof of

a violation under the antidumping law would chill trade by seriously deferring foreign companies from competing in the U.S. market with a price below the prevailing American price?

Mr. VERRILL. I do not think there would be any chilling effect to the extent that foreign companies that seek to enter the U.S. market do so consistent with our import policies and laws.

In other words, if they come in here and sell at fair value, or fair value without injuring domestic industry, then there is no chilling effect at all.

Mr. HORLICK. Our suggestion here is not to set up a new standard for them. It would apply in essence the same standards as under the antidumping laws but it would fill in a gap in the antidumping laws about the time period covered.

The idea would not be that they would have to conform to yet another jump through yet another hoop, as it were. They would have the same calculation on whether they should enter the U.S. market if our suggestions were put into effect as they already have under the 1979 Trade Agreements Act, the same set of calculations for them.

Senator BRADLEY. Yes, sir.

Mr. FELLER. Senator Bradley, I have one other thought here.

As practitioners in the trade field we are very much concerned that any revisions along these lines meet the intended objective. What we certainly do not want is for any revised 1916 act to be used as a sword rather than a shield.

We do not want something that could be abused. We want it to be carefully drafted so it will meet the legitimate objectives of the legislation.

Senator BRADLEY. Is it your judgment by making private judicial remedy more accessible could be in violation of U.S. obligations under the MTN subsidies code?

Mr. FELLER. We do not think that there is a GATT violation involved in the 1916 act along the lines of Senator Danforth's proposed amendment or the proposal that we have suggested, and we have agreed to supply a memorandum for the record, pursuant to the chairman's request.

Senator BRADLEY. You will provide it for the record?

Mr. FELLER. Yes, sir.

Senator BRADLEY. All right.

[The material to be furnished follows:]

MEMORANDUM REGARDING PROPOSED AMENDMENTS TO SECTION 801, REVENUE ACT OF 1916: COMPATIBILITY WITH GATT AND THE INTERNATIONAL ANTIDUMPING CODE

This memorandum, submitted on behalf of the Ad Hoc Labor-Industry Trade Coalition, sets forth the reasons for the conclusion that either the amendments to Section 801 of the Revenue Act of 1916 (15 U.S.C. 71, 72) proposed by Senator Danforth in S. 233, or those proposed by the Coalition in its statment before the Subcommittee on International Trade of the Senate Finance Committee, would be consistent with the international obligation of the United States. The pertinent obligations are those incorporated in Article VI of the General Agreements on Tariffs and Trade and in the Agreement on Implementation of Article VI (the so called International Antidumping Code).

Section 801 of the Revenue Act of 1916 outlaws predatory price discrimination in the import trade and provides criminal sanctions, as well as civil sanctions in the form of treble damage actions brought by private parties. It has nothing to do with antidumping duties. The proposed amendments to Section 801 would generally reduce the severity of the sanctions, including repeal of the criminal penalty

Senator Danforth's proposed amendment would modify Section 801 to parallel more closely the provisions of the Robinson-Pattman Act which is only applicable to domestic commerce. The approach of the Coalition would be to emphasize the tort-like nature of dumping by limiting aggrieved parties to the recovery of their actual damages, except, possibly, in aggravated circumstance where a court could award treble damages in its discretion (treble damages are mandatory under the current law).

GATT Article VI and the International Antidumping Code govern the assessment and collection of antidumping duties by the contracted parties. The scope and purpose of Article VI is to prevent dumping or to neutralize the unjustified price advantage caused by dumping. Thus, GATT Article VI:2 authorizes contracting parties to levy anitdumping duties "in order to offset or prevent dumping". It does not purport to affect the criminal law of the United States or the civil laws of the United States under which private parties may recover damages caused by wrongful acts of other private parties, whether those actions occur in domestic or foreign commerce, or whether those actions are condemned by public policies against anti-competitive behavior, unfair trade practices or tortious conduct.[1] Consequently, neither the 1916, nor either of the proposed amendments, is contrary to the U.S. obligation found in GATT Article VI.

Likewise, Article I of the International Antidumping Code, revised as part of the Tokyo Round trade negotiations, concluded in Geneva on April 12, 1979, provides:

"The imposition of an antidumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code. The following provisions govern the application of Article VI of the General Agreement insofar as action is taken under antidumping legislation or regulations".

Here, too, it is clear that the code, which is an elaboration of GATT Article VI, applies only to the assessment and collection of antidumping duties, and therefore, has no bearing on the 1916 Act, or the proposed amendments thereto. In that connection the Statements of Administration Action, submitted by the Executive Branch to the Congress as required part of the trade agreement approval process under Sections 102 and 151 of the Trade Act of 1974, explain the relationship between U.S. law and the trade agreements to which the United States is a party, as follows:

"The legislation proposes a number of changes to United States trade law which are necessary or appropriate to implement such trade."[2]

and

"* * * [T]he provisions of the Trade Agreements Act and the provisions of this statement regarding the administration of U.S. law have been developed to be *fully consistent with the trade agreements* negotiated in the MTN, and when the Act becomes effective, will permit the United States to carry out fully its obligations under the agreements".[3]

and

"The proposed law is also intended to ensure conformity of domestic legislation with the revised Antidumping Code negotiated in the MTN".[4]

The Executive Branch presumably did not feel that any modification of the 1916 Act was "necessary or appropriate" to fulfill any trade agreement obligation of the United States, since the implementing legislation it proposed contained no provision for such modification. Against that backdrop Congress approved the International Antidumping Code and the Statements of Administrative Action in Section 2(a) of the Trade Agreements Act of 1979.

In view of the foregoing it seems incontrovertible that neither of the proposed amendments to Section 801 of the Revenue Act of 1916 would in any way be circumscribed by the trade agreement obligation of the United States.

PETER BUCK FELLER.
CHARLES O. VERRILL, JR.
GARY N. HORLICK.

APRIL 4, 1980.

[1] GATT Article III:4 obligates contracting parties to extend "no less favorable" treatment to imported products than extended to domestic products with respect to laws and regulations affecting their internal sale, distribution or use. Neither the Section 801 amendments proposed by Senator Danforth, nor those proposed by the Coalition would give less favorable treatment to imports. S. 233 would in effect make the Robinson-Pattman Act applicable to imports. The Coalition's proposal would eliminate criminal penalties entirely and would generally eliminate treble damages, providing to that extent more favorable treatment to imports.

[2] House Document No. 96-153, Part II, trade Agreements Act of 1979/Statements of Administrative Action (June 19, 1979) at p. 389.

[3] Ibid. at p. 392.

[4] Ibid. at p. 393.

Senator BRADLEY. As someone who is not an expert on antitrust law, I would ask if you could explain to me why dumping by foreigners is closer or not closer to price discrimination under the Robinson-Patman Act than it is to the kind of price cutting that can lead to the creation of a monopoly covered by the Sherman Act?

Mr. VERRILL. Well, we have had a debate among our panel here and the answer to your question, I think, Senator Bradley, is the Robinson-Patman Act does deal with price discrimination within the United States. It has been held, it is my understanding, that discrimination in price between the United States and a foreign market does not constitute a Robinson-Patman Act violation.

The Dumping Act of 1921 is, in effect, a pricing discrimination statute. It involves a case where a product is sold in the country of manufacture at a higher price than it is sold in the United States. That is regarded as dumping, or price discrimination.

The Robinson-Patman Act does not apply to that situation as it has been interpreted by our courts.

Senator BRADLEY. How does it differ from the Sherman Act? How do you think dumping differs?

Mr. VERRILL. From the Sherman Act?

The distinctions are, perhaps, a little more difficult to draw although under the Sherman Act, section 1, of course you deal with condemnation contracts, conspiracy in restraint of trade

There you would have to find that two or more companies were combining or conspiring to dump and then, further, that was likely to restrain trade and result in a monopoly and so forth.

Then, under section 2 of the Sherman Act, you would have to show conduct that would lead to a monopoly position in the U. S. market or tend to create a monopoly with an intention to do so.

Senator BRADLEY. You are saying that foreign dumping is not similar to the Sherman-type violations?

Mr. VERRILL. That is correct.

Senator BRADLEY. All right.

Thank you, Mr. Chairman.

Senator RIBICOFF. Thank you.

[The prepared statement of Mr. Feller follows:]

STATEMENT ON BEHALF OF THE AD HOC LABOR-INDUSTRY TRADE COALITION

Good morning. My name is Peter Buck Feller. I am a member of the Washington, D.C. law firm of McClure & Trotter. With me this morning are Charles O. Verrill, Jr., of the law firm of Patton, Boggs and Blow (Washington, D.C.) and Gary N. Horlick of the law firm of Steptoe and Johnson (Washington, D.C.). We are appearing on behalf of the Ad Hoc Labor-Industry Trade Coalition, a group comprised of 33 industry and labor organizations with a common interest in strengthening the effectiveness of U.S. laws against unfair practices in international trade.

The Coalition heartily supports the objective of Senator Danforth's proposed amendments to Section 801 of the Revenue Act of 1916—sometimes called the Antidumping Act of 1916. Such amendments are long overdue. The 1916 Antidumping Act has been a flop. It is essentially unworkable, primarily because of the fact that specific intent to destroy or injure a U.S. industry must be shown. The burden of proof is on the plantiff. As a practical matter that burden of proof is impossible to sustain. The result is that no remedy has ever been obtained under this sixty-four year old law.

The shortcomings of the 1916 antidumping Act leave an important gap in the legal remedies available to American industry against this type of unfair trade

practice. While the administrative antidumping provisions in Title VII of the Tariff Act of 1930 (as amended by the TAA of 1979) are generally effective in preventing future dumping, there is no practical way that domestic firms or industries injured by dumping can be compensated for that injury. Presumably, the 1916 Antidumping Act was designed to provide such compensation at least in a number of circumstances. However, the 1916 Act has failed to serve that purpose.

What makes this a significant problem is that there can be a considerable lag between the time a foreign producer begins to dump his wares on the U.S. market and the time when an American firm or industry discovers that it is a dumping victim. It is not sufficient to know that competing imports are being sold at low prices. Information on prices in the home market or in third-country markets must be devoloped to determine whether price discrimination exists. This can be an extremely difficult and expensive exercise, especially for U.S. firms or industries that are small, fragmented or otherwise not equipped to police imports in this manner. In the meantime sales may have been lost, workers laid off, profits reduced, capital improvements put off, and so forth. The Ad Hoc Labor-Industry Trade Coalition believes that there is a need for an effective provision to compensate aggrieved parties for such injury.

Although members of the Coalition may not agree on all the details of a revised 1916 Antidumping Act, there is agreement on three basic points:

(1) The specific intent requirement should be dropped in favor of a much lower standard of culpability (e.g., whether the producer/exporter knew or had reason to know that it was dumping).

(2) The law should be essentially compensatory, rather than punitive, in nature. That is, the remedy should be actual damages, rather than treble damages. However, a provision for treble damages might be retained for egregious circumstances (to be defined in the statute) in the discretion of the court.

(3) The degree of price discrimination or dumping should be calculated in the same way as in administrative antidumping cases.

We also recommend consideration of certain other features which might appropriately be incorporated in a revised 1916 Antidumping Act, although that view may not be fully shared by all the members of the Coalition. Specifically, it would seem desirable to treat an administrative dumping finding as prima facie evidence that a complaint under a revised 1916 Antidumping Act is valid, thereby shifting the burden of proof to the respondent. The absence of an administrative dumping finding, however, should not foreclose action under a revised 1916 Act.

In addition, injunctive relief would appear to be inappropriate under this statute. An injunction is an extraordinary remedy that does not apply if there is an adequate remedy at law. Compensation for actual damages is usually regarded as an adequate remedy.

We also feel that an appropriate standard of injury would be injury to the complaining company, rather than to the industry as a whole. A provision permitting joinder by other companies claiming injury should be considered.

In our view there is no inconsistency between the 1916 Antitdumping Act, revised along the lines suggested above, and the international obligations of the United States, especially the International Antidumping Code. The Code relates to dumping duties only and does not have any effect whatever on the enforcement of U.S. laws dealing with anti-competitive or tortious behavior.

Mr. Palmeter and Mr. Cameron.

STATEMENT OF N. DAVID PALMETER, ESQ., ACCOMPANIED BY DONALD B. CAMERON, ESQ., DANIELS, HOULIHAN & PALMETER, ON BEHALF OF AMERICAN IMPORTERS ASSOCIATION

Mr. PALMETER. Mr. Chairman, I have a prepared statement which I ask be accepted for the record and I will summarize.

I am David Palmeter of the law firm of Daniels, Houlihan & Palmeter, Washington, D.C. I am accompanied by Donald B. Cameron of our firm.

We represent the American Importers Association in opposition to the amendments of title V of S. 223.

The American Importers Association is opposed to these amendments essentially for three reasons: First, title V would discrimi-

nate unfairly against imports by penalizing conduct only if it occurs in the import trade, as opposed to interstate commerce; second, it would provide antidumping sanctions that exceed those permitted internationally; third and perhaps more important, it would perpetuate and expand statutory and regulatory unfairness already imposed upon imported products by U.S. laws that ostensibly aim to regulate unfair competition.

These include the Antidumping Act of 1921, recently reenacted in what, to us, is the more restrictive form in the Trade Agreements Act of 1979, and the Antidumping Act of 1916 which would be amended by title V.

We submit that any fair, impartial analysis of the United States—and, I would have to add—the foreign antidumping regimes that I am familiar with——

Senator DANFORTH. Would you speak louder?

Mr. PALMETER. We would submit that any fair, impartial analysis of the antidumping laws, and, I would add, any foreign laws with which I am familiar, would deam them anticompetitive, prorestrictive, protectionist and, I would submit, unfair.

Conduct that is permitted, perhaps even lauded in domestic commerce is condemned by antidumping laws solely because it is international in nature. This includes our statute and the agreement.

In its release announcing these hearings, the committee asked the question: "What should be the purpose of the 1916 Antidumping Act?" Subsequent questions by the committee are premised on the assumption that the 1916 act indeed has a rational, fair purpose. We challenge that assumption and the reasons for that challenge lead us to conclude that the committee not only should reject title V of S. 223, but should repeal the 1916 Antidumping Act and the recently enacted successor to the 1921 act as well.

The basic premise of all of these laws is that differential pricing betweeen international markets is to be condemned; specifically, that sales for export at prices below those of the home market are unfair.

But why should differential pricing between markets be prohibited in the first place? What is unfair about it? How does it differ from differential pricing within a market? How is it more unfair?

What is the basis for saying that differential pricing across the Rio Grande or the St. Lawrence Rivers is unfair but that differential pricing across the Mississippi, the Ohio or the Potomac is not?

A secondary premise of these laws is that international sales below cost of production also can be unfair, yet in recent years, such U.S. concerns as Chrysler, Bethlehem Steel, and Lockheed have operated at losses, and therefore, presumably, have sold their products below the cost of production.

This may be very undesirable, but is it unfair? If it is not, why is it unfair for an exporter to do the same thing?

In common law terms, differential pricing and sales below the cost of production are not malum in se—acts that are inherently and essentially evil and immoral such as murder or larceny. Rather, they are malum prohibitum—acts that are wrong only because they are prohibited by law, such as driving on the left side

of most highways in the United States, or on the right side of most highways in the United Kingdom or Japan.

If differential pricing across the Rio Grande or St. Lawrence is illegal but differential pricing across the Mississippi or the Ohio or the Potomac is not, if selling below cost by foreign firms is illegal, but selling below cost by U.S. firms is not, it is only because the positive law has so provided—malum prohibitum—and not because there is anything inherently wrong in the conduct—malum in se.

But the positive law attaches emotionally-laden, pejorative labels to that conduct—labels like "unfair" and "dumping". Unfair competiton and dumping certainly sound like reprehensible practices, the argument seems to go, so why should they not be subject to severe sanctions? Why should not such conduct be punished?

The rhetoric is seductive, but it is dangerous. It searches for a villain, for a scapegoat, to the economic problems that face this country. There is no villain out there whose unfair and dumped exports are the cause of the serious economic problems that face this country—no dumper is responsible for soaring inflation, 17 percent home mortgages, or energy shortages—to the contrary, the United States probably could use some imported oil priced below fair value.

By questioning the fundamental premises of the antidumping laws, we do not intend to minimize the serious economic problems this country faces. The Congress justifiably is concerned with the steelworkers of Johnstown and Youngstown who have lost jobs because of plant closings, and with the 200,000 auto workers who have been laid off.

But does it make a difference to those steel workers what the price of Japanese steel is in Japan? Did they lose their jobs because of Japanese pricing practices in Japan—whether those prices are higher or lower than prices to the United States—or did they lose their jobs because the facilities in which they worked, in some cases, are headed for industrial museums and scrap heaps?

Are 200,000 auto workers unemployed today because of prices charged in Japan for Toyotas and Datsuns—or are they unemployed because the American industry for years did not make the small, fuel efficient car the American consumer demands?

How would any of these workers be helped by title V of S. 223—specifically, what good would it do those workers or any other workers, if, years later, their bosses manage to collect treble damages?

The answer to the economic problems the country and the world face do not lie in the application of the arcane provisions of the antidumping laws. Those laws, for example, take a situation in which an importer sells three identical quantities of goods to the same customer on the same day at the same price, and terms the sales "fair" or "unfair" depending upon the source of those goods, whether they are to be shipped by the exporter, or are sold in transit after shipment, or are shipped from warehouse in the United States—three different "fair values" for the same importer to the same customer for the same quantities on the same day for the same price.

Mr. Cassidy, in his testimony, stated it is doubtful that any manufacturers in foreign countries can know if they are dumping,

in a technical sense, whether dumping is occurring. In my experience in handling antidumping cases, that is very true, not only of dumping in the technical sense but also of dumping in the nontechnical sense, which is why the term is widely used, "sales below fair value."

This is because of the arcane, if you will, adjustments that are necessary to reach the ex-factory price that has no counterpart in domestic law such as the Robinson-Patman Act.

Jobs in Johnstown, Youngstown and Detroit should not depend on distinctions of this kind. Yet, these are the distinctions on which antidumping cases turn—on which labels of "fair" and "unfair" and "dumping" depend. The labels are charged, emotional, and pejorative. But the conduct to which those labels apply usually is rather ordinary. It is not conduct that is responsible for the economic problems of this country.

The American Importers Association therefore, does not believe that the committee should report favorably on title V of S. 223. This is the wrong way to go.

Rather, we ask the committee to investigate anew what international conduct it is that our antidumping laws regulate; whether this conduct requires regulation at all; and, if it is determined that this conduct does require regulation, whether our present form of regulation is fair and reasonable.

These are fundamental questions that need the attention of the Congress. The American Importers Association stands ready to cooperate with this committee and the Congress in that endeavor.

Senator RIBICOFF. You gentlemen, if you so desire, would you submit to the committee your memoranum supporting the position that this legislastion would violate the GATT agreements and, especially, the international antidumping agreements?

Mr. PALMETER. Yes; we will submit it.

[The material referred to follows:]

DANIELS, HOULIHAN & PALMETER, P.C.,
Washington, D.C., March 26, 1980.

Hon. ABRAHAM A. RIBICOFF,
Chairman, Subcommittee on International Trade, Senate Committee on Finance, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR RIBICOFF: At the Committee's March 1 hearing concerning Title V of S. 223, which would amend the Antidumping Act of 1916, you asked for my views concerning the consistency of Title V with the provisions of the recently adopted International Antidumping Agreement.[1] As you know, that Agreement became effective as to the United States, according to the terms of the Trade Agreements Act of 1979, on January 1, 1980.

Article 16, paragraph 1, of the Agreement states:

"No specific action against dumping of exports from another party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."

The Agreement goes on to define "dumping" as the equivalent of sales at Less Than Fair Value, i.e., the sale in the export market at prices below those that generally prevail in the home market. (Article 2, paragraph 1, International Antidumping Agreement).

It is clear that any specific action taken against dumped exports other than that sanctioned by the Agreement specifically is prohibited by Article 16, paragraph 1 of the Agreement. Provision for award of damages, whether single or treble damages as Title V would provide, is outside the relief permitted by the Agreement, and therefore, by definition, inconsistent with it.

[1] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures).

We think this matter is too plain to require or deserve extended debate. Even though it is legally within the power of the United States to enact and enforce laws inconsistent with the Agreement, for this government to do so would be extremely unwise.

This Agreement is a genuine achievement in the effort to establish international rules for the conduct of trade. The United States long as been in the forefront of that effort. We should not be in the forefront of the effort to break those rules so blatantly, so obviously, and so soon. Title V would do just that. It should be rejected.

With best regards.

Sincerely,

N. DAVID PALMETER.

Senator RIBICOFF. Senator Danforth?

Senator DANFORTH. I have no questions.

Senator RIBICOFF. Senator Chafee?

Senator CHAFEE. I am not quite ready.

Senator RIBICOFF. Senator Bradley?

Senator BRADLEY. I would like to ask you gentlemen the same question that I asked the previous witnesses. Do you think that dumping is similar to violations under Robinson-Patman or under the Sherman Act?

Mr. PALMETER. I think it is much closer to the Sherman Act. In my view, Senator Bradley—I would have to stress I do not consider myself an antitrust expert, but the Robinson-Patman Act, as I understand it, prohibits price competition within a market.

For example, if I were to be selling a product to two stores in Washington, D.C. and charged different prices to them, I could be in violation of the act. Whereas the analogy to the dumping act would be charging one price in Washington, D.C., and another price in Seattle, Wash., where my customers do not compete.

My understanding of Robinson-Patman is that it goes to the question of competition between the sellers' customers. I see no distinction between the type of conduct, pricing conduct, that is covered by the antidumping act, the 1916 act, the 1921 act, as amended by the 1979 law, and that covered by the Sherman Act, particularly Sherman II.

The burden is very difficult in Sherman II whether domestic or international. But it is the same burden and we do not think there should be any reason to make it any easier, to get a foreign predator if you will, than to set a domestic predator.

We should set a standard for getting price predators, period, without discrimination as to where they are located.

Senator BRADLEY. You are saying the differences in standards applied to domestic versus foreign price predators, in your view, is a problem here?

Mr. PALMETER. Very much, Senator. We are upset, or concerned with the possibility of discrimination. We do not think it is necessary. We think that predatory pricing should be outlawed, and it should be outlawed in the same terms for whomever does it, wherever it is done, if it affects in our market and the United States has legitimate jurisdiction.

Clearly on imports, it is conceded that the United States has jurisdiction.

Senator BRADLEY. Thank you, Mr. Chairman.

Senator RIBICOFF. Senator Chafee?

Senator CHAFEE. Yes.

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I am not sure that this is entirely different from Senator Bradley's question, but on the first page of your testimony you say that importers and exporters are subject to the antitrust laws of the United States, in violation of the antitrust laws.

Do we not get back to the problem we were discussing earlier about the difficulties of proof, getting the evidence from a foreign exporter, what his pricing policies were, what his costs were? Is that not really the difficulty of how we got to this point?

Mr. PALMETER. Well, Senator, I do not think that is the case. My experience has been, in dumping cases under the 1921 act, that foreign producers furnished enormous quantities of information in very short periods of time. I am not aware of any complaints of that nature, really, in terms of getting the information in our antitrust laws per se.

I have been told, and I have read about, difficulties that have occurred in the international arena because of U.S. subpenas served on U.S. defendants in foreign countries with foreign records, but I think that is quite a bit different from the United States using its judicial process on operations that occur in this country and clearly, if there are any difficulties, I see no reason why some type of international agreement comparable to what we have in the antidumping area of providing for the production of this type of information to the national authorities concerned.

But I would think that U.S. plaintiffs are going to have as tough a time getting the information out of General Motors as they are out of Toyota, if that is who they are concerned with.

Senator CHAFEE. I have a problem with your third point on the first page. You say, perhaps it is more important to realize that this proposal would perpetuate and expand statutory and regulatory unfairness already imposed on imported products.

I do not see imported products that have had such a problem in this country. You are saying this would expand the unfairness on these products?

Mr. PALMETER. I try to touch on that later in my testimony. What it has reference to is that we already prohibit pricing practices on foreigners in this country that we permit domestically. We draw a distinction between rivers, if you will—the analogy I used between the Rio Grande and St. Louis and Mississippi on the other.

If a Canadian manufacturer decided that he had to lower his price to sell in New York State, that would be presumably a less-than-fair-value sale under the antidumping laws. If an Illinois manufacturer decided to lower his prices in Iowa, that would be competition.

If he were predatory about it, he would be in violation of the Sherman Act, but not necessarily, as I understand it, it would not be a violation of any other law in the United States.

We outlaw conduct internationally across the Rio Grande or the St. Lawrence that we do not outlaw across the Mississippi. In fact, there are other provisions in the law that could be said to encourage that type of conduct domestically, so we feel that that statutory regime imposes a burden on imported products that is not imposed equally on domestic products.

That is what I had reference to in point three.

Senator CHAFEE. Thank you, Mr. Chairman.

Senator RIBICOFF. Senator Bradley, do you have some more questions?

Senator BRADLEY. I would like to ask one more question, Mr. Chairman, the question that I posed to the other witnesses. In your view, would the proposed revisions to the 1916 law have consequences that would be inflationary?

Mr. PALMETER. I think they probably would be Senator Bradley, although it is hard to quantify.

Senator BRADLEY. Could you explain why you think they would be?

Mr. PALMETER. I think they would be restrictive of international trade, not only in terms of U.S. imports but, eventually, in terms of U.S. exports.

I note, for example, our trading partners in Western Europe are becoming more active in the antidumping field. The next time around, it might concern fiber manufacturers, yarn manufacturers, and you are reducing trade. Reducing trade, both on the import and the export side, reduces market efficiencies and that inherently is inflationary.

I think that is what could happen.

One of the things that we in the American Importers Association worry about is the trend toward others adopting provisions similar to ours and the possibility of a trade war, and that is very inflationary.

Senator BRADLEY. How would this reduce trade, in your judgment?

Mr. PALMETER. The chilling effect.

Senator BRADLEY. I have heard that a couple of times this morning, but could you be more specific?

Mr. PALMETER. International trade is risky business in the best of times, dealing with foreigners and foreign money and shipping strikes and long deadlines, and what do you do if you get the merchandise and it is not what you ordered. It is difficult enough as it is.

When you add to this the uncertain legal burdens, people become less interested. They become frightened, they pull back, and there is less trade.

People do not want to take the risk.

Senator BRADLEY. Your assumption is that because there is less trade there is less competition?

Mr. PALMETER. Fewer goods in the market made by the more efficient producers, whether in the United States or abroad.

Senator BRADLEY. In the optimum allocation of resources, worldwide?

Mr. PALMETER. Is not achieved, is interfered with.

Mr. CAMERON. Senator, taking the Antidumping Act, the one thing that can be said about it is that it is prospective in nature. In other words, as Mr. Cassidy said this morning in the majority of cases, exporters are not aware that dumping is or is not occurring.

Once a dumping finding is in effect there is what you could call a formula which establishes at what point your goods will be fair valued, at what point they are below fair value.

In this case, what we are talking about is taking conduct which basically is vague at best and then condemning it retroactively and

not only to the extent that it was below fair value but actually extracting punitive measures, not for predatory conduct but merely for natural pricing.

In our opinion, when you cannot determine whether those prices were or were not below fair value, that is rather unfair and would be inflationary.

Mr. PALMETER. It is a very difficult point, Senator, from the point of view of an exporter. As Mr. Cassidy said, and I want to emphasize it, I do not know of anyone from the Department of Commerce, or the Department of Treasury, STR or a practitioner who could tell the manufacturer of this ashtray what fair value is in terms of what his purchase price and what his exporter sales price is ahead of time.

I do not know how it can be done, and I have practiced in the field for 10 years.

If you say if you are wrong, treble damages, people will think twice before they even get into the business.

Senator DANFORTH. May I ask one question?

Senator RIBICOFF. Yes.

Senator DANFORTH. What is—maybe you are not familiar—what is the meaning of the term "predatory pricing"?

Mr. PALMETER. Senator, I have heard it. I will not hold myself as an expert, but as I understand the antitrust sense, the Sherman Act was a price where it was intended to establish a monopoly.

Senator DANFORTH. How does it occur, do you know—predatory pricing?

Mr. PALMETER. I have never witnessed it. I do not know how it occurs.

There was talk it occurred in the *Standard Oil* case back in the early part of the century. I understand there are economists now who are saying it did not occur.

Senator DANFORTH. You have never seen it yourself?

I wonder if you could create a hypothetical case? I am not talking about trade, I am just talking about general domestic practice, of what predatory pricing would be.

Mr. PALMETER. Senator, as I understand the term it would be a producer, a seller of a product, I suppose—it does not have to be a manufacturer—a seller who prices his product at a level designed to drive his competition out of the market with the goal of then bringing the price abnormally high after the competition and left the market on the assumption that the competition could not compete.

Senator DANFORTH. The theory of predatory pricing, at least the hypothetical case, would be that the price would be reduced to a low level, the competitor would not be able to meet that price, and would be driven out of business and then the person who engaged in the predatory pricing would be able to charge whatever he wanted, right?

Mr. PALMETER. I understand that is the theory, yes.

Senator DANFORTH. The theory would be that competition is good for the consumer and that predatory pricing is bad for competition. Is that not a fair statement?

Mr. PALMETER. That is a fair statement.

Senator DANFORTH. Senator Bradley asked about inflationary effect, and I suppose predatory pricing, at the outset, is not inflationary at all. It is the opposite. It is a darn good deal.

If there is a price war going on, or somebody is slashing prices, if there were such a hypothetical case, but let us suppose—you never heard of it, but suppose there is a gas war, that that would be a very good deal for the consumer who could go to the gas station and get gas very cheaply, would it not be?

Mr. PALMETER. A gasoline war?

Senator DANFORTH. Yes.

Mr. PALMETER. It has been a long time. I have seen those. I did not know they were predatory.

Senator DANFORTH. For a consumer to go and be able to buy something at a very low price, that is certainly anti-inflationary, is it not?

Mr. PALMETER. By definition I would have to agree with that, Senator.

Senator DANFORTH. Sure.

If the question is, is it inflationary to insist that there is no such thing, that there should be no predatory practice, it would be inflationary for the time being.

Mr. PALMETER. Senator, Mr. Cameron just reminded me, I suppose that is what the intent requirement is. I could say that definitely could be proinflationary, if competition were destroyed—and we certainly do not advocate that. That is why we have the Sherman Act that applies equally to imports and exports.

As I would understand title V, it would reach situations that are not in that situation. It would go beyond the so-called predatory pricing that you are defining to reach a situation where I would defy anyone to tell an exporter what his treble damage liability may be based on a purchase price or exporter sale price situation for the ashtray. I do not think it exists.

All I can concede, and certainly would agree, that we should discourage that type of predatory pricing that unfairly drives competitors out of business and therefore damages competition.

I feel that it is equally egregious to the consumer and inflationary, regardless of who engages in it, an American producer or a foreign producer, and we should get them all equally.

Senator DANFORTH. Do you think we should repeal the Robinson-Patman Act?

Mr. PALMETER. I am not a scholar on Robinson-Patman, but I understand there are some procompetition scholars who take that position. I am not familiar enough with the issues to comment.

Senator DANFORTH. You have done a very good job of stating your position, which is you do not like antidumping laws and I would take it that, to be consistent, you do not like Robinson-Patman either.

Mr. PALMETER. I would have to confess a lack of familiarity with the fine-tuning on Robinson-Patman. I really do not feel qualified.

Senator DANFORTH. All this bill does it to try to apply Robinson-Patman to foreign sources as well.

Mr. PALMETER. Maybe that could be done by an amendment to the Robinson-Patman Act that would say Robinson-Patman applies

to interstate and foreign commerce equally. Clearly, the Congress has the authority to regulate both.

That could be the quick, easy way to do it.

Senator DANFORTH. That is what we are doing in this bill.

Mr. PALMETER. That would also give the exporters a different measure rather than purchase price, or exporters sales price, which is the major difficulty we have, and it would also open up to them the affirmative defenses of Robinson-Patman not available under the dumping act now.

Senator DANFORTH. All under this bill?

Mr. PALMETER. I am not really clear what they are, but the original provision, as I see it, title V seeks to penalize a manufacturer in a foreign country for which purchase price or exporter sale price is less than fair market value.

Those are not only terms but, in my understanding, concepts that are totally alien to the Robinson-Patman Act and have no bearing on whether a violation is charged there.

Senator DANFORTH. Well, I think you might like to read the bill.

Mr. PALMETER. I have, Senator.

Senator DANFORTH. Thank you.

[The prepared statement of Mr. Palmeter follows:]

TESTIMONY OF THE AMERICAN IMPORTERS ASSOCIATION

Mr. Chairman and members of the committee, I am David Palmeter of the law firm of Daniels, Houlihan & Palmeter, P.C., Washington, D.C. I am accompanied by Mr. Donald B. Cameron, Jr. of our firm.

We appear on behalf of the American Importers Association (AIA) in opposition to the amendments that Title V of S. 223 would make in the 1916 Antidumping Act.

AIA is opposed to these amendments essentially for three reasons: (1) Title V would discriminate unfairly against imports by penalizing conduct only if it occurs in the import trade, as opposed to interstate commerce; (2) it would provide antidumping sanctions that exceed those permitted internationally; (3), and perhaps more important, it would perpetuate and expand statutory and regulatory unfairness already imposed on imported products by United States laws that ostensibly aim to regulate "unfair" competition. These include the Antidumping Act of 1921, recently re-enacted in more restrictive form in the Trade Agreements Act of 1979, and the Antidumping Act of 1916 which would be amended by Title V.

At the outset, we would emphasize that it is axiomatic that imports (and importers and exporters) are subject to the antitrust laws of the United States. Violations of the antitrust laws in the import trade are neither more nor less violations because foreign, rather than interstate, commerce is involved. AIA seeks no exemption from the antitrust laws for imports. We assert, however, that there is no need for any difference in the application of the antitrust laws to goods of foreign origin as opposed to goods of U.S. origin. Thus, in our view, there is no need for Title V, nor for the Antidumping Act of 1916 itself, nor for any other statute, that regulates competition in imports simply because they are imports in a manner that differs from regulation of domestic goods.

Such discrimination would clearly amount to a violation of the international obligations of the United States as contained in the General Agreement on Tariffs and Trade and the International Antidumping Agreement.[1]

The 1916 Antidumping Act and Title V of S. 223 have to do with differential pricing between markets—specifically, sales in the United States at prices below those that prevail in the country of exportation. Both provide for remedies—fines, imprisonment, treble damages—that exceed those permitted by the International Antidumping Agreement. The Agreement provides for the imposition of dumping duties in certain circumstances—and only duties. Any action which goes beyond those duties would violate the Agreement. The 1916 Act, and Title V, therefore, by going beyond duties, constitute a violation of the international obligations of the United States as set forth in the Agreement.

[1] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures).

For the United States to enact additional legislation which violates these obligations, less than a year after undertaking them, would be construed by our trading partners as a rather cynical disregard of our commitments. For this reason alone, we submit, Title V of S. 223 and like legislative proposals, should be rejected by the Congress—and the 1916 Act should be repealed.

But there is an even more important reason for AIA's opposition to Title V. That reason is that the bill would perpetuate and expand the already existing unfair statutory burden imposed on imports by the antidumping laws of the United States.

We submit that any fair, impartial, analysis of the U.S. antidumping laws would deem them anti-competitive, pro-restrictive, protectionist, and unfair. Conduct that the permitted—perhaps even lauded—in domestic commerce is condemned by the antidumping laws solely because it is international in nature.

In its release announcing these hearings, the Committee asked the question: "What should be the purpose of the 1916 Antidumping Act?" Subsequent questions by the Committee are premised on the assumption that the 1916 Act indeed has a rational, fair purpose. We challenge that assumption and the reasons for that challenge lead us to conclude that the Committee not only should reject Title V of S. 223, but should repeal the 1916 Antidumping Act and the recently enacted successor to the 1921 Act as well.

The basic premise of all of these laws is that differential pricing between international markets is to be condemned; specifically, that sales for export at prices below those of the home market are "unfair".

But why should differential pricing between markets be prohibited in the first place? What is "unfair" about it? How does it differ from differential pricing within a market? How is it more "unfair"? What is the basis for saying that differential pricing across the Rio Grande or the St. Lawrence Rivers is "unfair" but that differential pricing across the Mississippi, the Ohio or the Potomac is not?

A secondary premise of these laws is that international sales below cost of production also can be "unfair", yet in recent years, such U.S. concerns as Chrysler, Bethlehem Steel, and Lockheed have operated at losses, and therefore, presumably, have sold their products below the cost of production. This may be very undesirable, but is it "unfair"? If it is not, why is it unfair for an exporter to do the same thing?

In common law terms, differential pricing and sales below cost of production are not *malum in se*—acts that are inherently and essentially evil and immoral such as murder or larceny. Rather they are *malum prohibitum*—acts that are wrong only because they are prohibited by law, such as driving on the left side of most highways in the United States, or on the right side of most highways in the United Kingdom or Japan.

If differential pricing across the Rio Grande or St. Lawrence is illegal but differential pricing across the Mississippi or the Ohio or the Potomac is not, if selling below cost by foreign firms is illegal, but selling below cost by U.S. firms is not, it is only because the postive law has so provided—*malum prohibitum*—and not because there is anything inherently wrong in the conduct—*malum in se*.

But the positive law attaches emotionally-laden, pejorative labels to that conduct—labels like "unfair" and "dumping". "Unfair" competition and "dumping" certainly sound like reprehensible practices, the argument seems to go, so why should it not be subject to severe sanctions? Why should not such conduct be punished?

The rhetoric is seductive, but it is dangerous. It searches for a villain, for a scapegoat, to the economic problems that face this country. There is no villian out there whose "unfair" and "dumped" exports are the cause of the serious economic problems that face this country—no "dumper" is responsible for soaring inflation, 17 percent home mortgages, or energy shortages—to the contrary, the United States probably could use some imported oil priced below "fair" value.

By questioning the fundamental premises of the antidumping laws, we do not intend to minimize the serious economic problems this country faces. The Congress justifiably is concerned with the steel workers of Johnstown and Youngstown who have lost jobs because of plant closings, and with the 20,000 auto workers who have been laid off.

But does it make a difference to those steel workers what the price of Japanese steel is in Japan? Did they lose their jobs because of Japanese pricing practices in Japan—whether those prices are higher or lower than prices to the United States—or did they lose their jobs because the facilities in which they worked, in some cases, are headed for industrial museums and scrap heaps?

Are 200,000 auto workers unemployed today because of prices charged in Japan for Toyotas and Datsuns—or are they unemployed because the American industry

for years did not make the small, fuel efficient car the American consumer demands?

How would any of these workers be helped by Title V of S. 223—specifically, what good would it do those workers or any other workers, if, years later, their bosses manage to collect treble damages?

The answer to the economic problems the country and the world face do not lie in the application of the arcane provisions of the antidumping laws. Those laws, for example, take a situation in which an importer sells three identical quantities of goods to the same customer on the same day at the same price, and terms the sales "fair" or "unfair" depending upon the source of those goods: whether they are to be shipped by the exporter, or are sold in transit after shipment, or are shipped from warehouses in the United States—three different "fair values" for the same importer to the same customer for the same quantities on the same day for the same price.

Jobs in Johnstown, Youngstown and Detroit should not depend on distinctions of this kind. Yet, these are the distinctions on which antidumping cases turn—on which labels of "fair" and "unfair" and "dumping" depend. The labels are charged, emotional, and pejorative. But the conduct to which those labels apply usually is rather ordinary. It is not conduct that is responsible for the economic problems of this country.

The American Importers Association, therefore, does not believe that the Committee should report favorably on Title V of S. 223. This it the wrong way to go. Rather, we ask the Committee to investigate a new what international conduct it is that our antidumping laws regulate; whether this conduct requires regulation at all; and, if it is determined that this conduct does require regulation, whether our present form of regulation is fair and reasonable.

These are fundamental questions that need the attention of the Congress. The American Importers Association stands ready to cooperate with this Committee and the Congress in that endeavor.

Senator RIBICOFF. Mr. Ehrenhaft?

STATEMENT OF PETER D. EHRENHAFT, ESQ., HUGHES, HUBBARD & REED

Mr. EHRENHAFT. Mr. Chairman and Senators, I am glad to have this opportunity to come back to this table where I sat so long last spring. On this occasion, I am here purely as a private individual, but I thought that my experiences as a Deputy Assistant Secretary of the Treasury and having had a hand in administering the Antidumping Act for the last 3 years might provide you with some useful information as you are considering this 1916 act amendment.

As you know, I came to the Treasury position—in part—because of of an article I wrote in 1958 about the Antidumping Act. I am presently preparing another article for publication this spring in the Georgetown Journal of Law and Policy in International Business concerning antidumping administration. That is the statement I would like to submit to you when it is published.

Senator RIBICOFF. Without objection, when you publish that article, if you would submit it to us, we would put it in the record.

Mr. EHRENHAFT. Thank you, sir.

[The article and a letter follow. Oral testimony continues on p. 86.]

Hughes Hubbard & Reed
1660 L Street, N.W.
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March 13, 1980

Honorable Abraham A. Ribicoff
Chairman, Subcommittee on International Trade
Committee on Finance
United States Senate
Washington, DC 20510

Re: Amendments to the Antidumping Act of 1916

Dear Mr. Chairman:

I appreciated the opportunity to appear before your Subcommittee on March 11 and share with you and your colleagues some of the impressions gained from my experience in the administration of the Antidumping Act of 1921 while serving as the Deputy Assistant Secretary and Special Counsel for Tariff Affairs at the Treasury through the end of 1979. One issue that was raised at the hearing, however, that I did not have time to address concerned your question about the compatibility of a statute authorizing a private cause of action to recover damages caused by dumping with the newly negotiated Code on Antidumping Measures to which the United States has now adhered. It is a very good question. I cannot provide you with a legal opinion as a reply. But I can indicate my views, based on more than 22 years of study and experience with antidumping laws and my particular recent responsibility both in connection with the negotiation of the Antidumping Code in the MTN and leading the U.S. delegation to the 1977 through 1979 meetings of the GATT Antidumping Committee.

In my judgment, a statute permitting the recovery of compensatory -- particularly "single," as opposed to "treble" -- damages for injury caused by tortious business behavior could not be regarded as a breach of the Antidumping Code.

First, the Antidumping Code is an agreement on the "Implementation of Article VI of the GATT." Article VI of the GATT does not prescribe the only method for dealing with the problem of dumping. Section 1 defines the concept of dumping -- injurious price discrimination between national markets -- and Section 2 states that

> "In order to offset or prevent dumping a contracting party may levy an antidumping duty not greater in amount than the margin of dumping . . . ."

The GATT, itself, thus does not suggest, much less state expressly, that antidumping duties are the exclusive method by which the problem of dumping may be addressed. It simply indicates that if the problem is attacked through the imposition of an "antidumping duty," that duty may not exceed the margin of dumping.

Second, the Code, itself, is concerned only with the implementation of the cited Article of the GATT. That is clear from Article I of the Code, taken almost verbatim from the 1967 Code. The Code speaks about the "imposition of an antidumping duty . . . to be taken only under the circumstances provided for . . . and pursuant to . . . this Code." (Emphasis added.) Thus, the Code also does not affect other actions that are not in the nature of "duties," that may affect goods that are "dumped."

Third, both when the 1967 Code was negotiated and throughout the MTN, our trading partners (not to speak of the U.S. negotiators) knew about the existence of the U.S. 1916 Antidumping Act providing criminal penalties and treble damages for acts that are comparable to those at which antidumping "duties" are aimed. Nevertheless, as far as I know, no claim was ever made by any foreign government or any U.S. agency that the existing 1916 law contravenes the Code. It may be argued that the existing law, with its requirement for "intentional injury" defines offensive behavior different in kind from that addressed by the GATT or the Code. However, that argument supports the view that the Code does not exhaust all possible remedies that a government may adopt to combat or remedy practices analogous to the "strict liability" dumping defined by the Code (i.e., "dumping" without any "intent to injure" element).

A statute that provides compensatory damages recoverable through a private action in a court of law for market behavior that has unjustifiably caused injury should not be read to be -- and, in my view, is not -- inconsistent with the Code. It supplements the Code-envisaged remedy. Even retention of treble damages

and criminal penalties for intentional injurious behavior should not be regarded as Code inconsistent. However, as a number of witnesses at the hearing indicated, the existing antitrust laws would seem adequate to cope with intentionally harmful pricing and no further civil remedy is needed to deal with it.

A slightly more troublesome issue was raised by some witnesses concerning the possible incompatibility of a statute permitting a cause of action affecting only imported goods with the "national treatment" provisions of Article III of the GATT. However, we presently have domestic laws -- primarily the Robinson-Patman Act -- that contemplate remedies against sellers who discriminate between markets to the detriment of the seller's competitors. (Representatives of the American Importers Association discussed at the hearing the wholly separate -- and admittedly inapplicable -- remedy of the Robinson-Patman Act available to competitors of a favored customer.) The creation of a remedy addressed to imported goods causing injury to competition at the seller's level should not breach Article III to the extent that it parallels comparable domestic law. Mere extension of the Robinson-Patman Act to international trade would be one way to achieve that result. But it may not be the best method, in part because it may be desirable for some of the reasons indicated in my oral testimony to vest trial jurisdiction over the international remedy in the Customs Court that will otherwise be interpreting the language of the anti-dumping laws.

In any event, before any action is taken to creat a new cause of action, I would urge the Subcommittee to commission some further, serious factual studies of the existence of "dumping" as a real phenomenon in U.S. trade and the extent to which our existing laws have affected both trade in particular and the economy of the Nation in general. I believe such a study would support my impression that a private remedy of the type being proposed might make good sense for many of the smaller cases that make up the bulk of the work of the "Administering Authority," while the law is not well suited to cope realistically with the big cases. For those problems -- steel, textiles, automobiles -- alternative, more macro-economic responses are required outside either the private suits contemplated by the bill you are considering or the procedures now authorized by the Trade Agreements Act.

Respectfully submitted,

Peter D. Ehrenhaft

cc: Honorable John C. Danforth
United States Senate

Lynn J. Barden, Esquire
Department of Commerce

Honorable Robert Cassidy
United States Trade Representative

WHAT THE ANTIDUMPING AND COUNTERVAILING DUTY PROVISIONS OF THE TRADE AGREEMENTS ACT [CAN] [WILL] [SHOULD] MEAN FOR U.S. TRADE POLICY

PETER D. EHRENHAFT*

INTRODUCTION

Pick up today's newspaper. A front page article will deplore the problems of inflation. A piece in the business section will demand less government intervention in the economy. The need to restrain price increases and to reduce government involvement are popular current themes. It is the thesis of this article that the recent amendments to the antidumping and countervailing duty laws, adopted as a part of the Trade Agreements Act of 1979,[1] run against these tides. The amendments—and their extensive implementing regulations—improve the "law." It is now more clear; it provides greater transparency and accountability by the administrators and, for the first time, it recognizes the need for and the desirability of "quick fix" measures to defuse international trade disputes. But, in its underlying approach, the law will increase

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[1] Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.) [hereinafter cited as Trade Agreements Act]. The amendments to the antidumping and countervailing duty laws are contained in titles I and X of the Trade Agreements Act. Section 106 of Title I of the Trade Agreements Act repeals the Antidumping Act of 1921, 19 U.S.C. §§ 160–171 (1976); section 101 replaces it by adding a new countervailing and antidumping duties title to the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1202–1654 (1976) [hereinafter cited as Tariff Act of 1930]. This new title, title VII, will be codified at 19 U.S.C. §§ 1671–1677g. The other significant change is made by section 1001(a) of title X of the Trade Agreements Act, which adds to the Tariff Act section 516A, relating to judicial review in countervailing and antidumping duty proceedings. Section 516A will be codified at 19 U.S.C. § 1516a.

Throughout this article, citations of the new provisions will refer to the new sections of the Tariff Act, rather than to the Trade Agreements Act.

inflationary pressures on the economy, while the long-term gains in efficiency and competition that are supposed to result from its application remain speculative. Most regrettably, perhaps, the amendments significantly enhance, rather than reduce, government involvement in matters that might often best be left to the free market.

The basic principles of the antidumping and countervailing duty laws are simply stated. The premise of the antidumping law is that if a foreigner producer sells at a given price in his home market, he ought not to sell for less in the United States if the effect of such sales is to injure U.S. producers of like merchandise.[2] An important new (since 1975) element of the law—and one that is likely to lie at the heart of most future antidumping actions—is that a producer should not sell exports at less than cost for extended periods if the effect is to injure the domestic industry of the importing country.[3] The premise of the countervailing duty law is that if a foreign producer receives from his government (or, indeed, from some third party) a benefit that facilitates his export of goods to the United States, and if a domestic producer of like goods is injured, an import duty should be imposed to offset the subsidy and restore the competitive balance.[4]

At the root of both laws is the notion that U.S. producers of goods that are competitive with imports are entitled to government-imposed protection against foreign "unfair" competition.[5] Few would deny that the preservation of "fair competition" is a laudable goal. There even may be no serious dispute over the proposition that rules are needed to protect the industries and workers of the United States from predatory pricing practices and the trade-destructive effects of foreign subsidies. But the traditional concept of price discrimination, which is at the heart of the antidumping law, focuses entirely on a difference in prices charged by the individual foreign producer in his domestic and foreign markets;[6] the element of predation is lacking from both the 1921

[2] *See* H.R. REP. No. 317, 96th Cong., 1st Sess. 44 (1979) [hereinafter cited as H.R. REP. No. 317].

[3] Tariff Act of 1930, *supra* note § 773(b) (to be codified at 19 U.S.C. § 1677b(b)). *See* notes 19-20 *infra* and accompanying text for discussion of this section.

[4] *See* H.R. REP. No. 317, *supra* note 2, at 49. The benefit to the foreign producer may take the form of a direct or indirect subsidy provided with respect to the manufacture, production or export of the merchandise. *Id.*

[5] *See id.* at 43, 44.

[6] *See id.* at 44.

Act and its 1979 reenactment.[7] Dumping does not exist merely because the foreigner undersells all U.S. competitors; on the other hand, dumping is not avoided because the foreigner is merely meeting the price of the U.S. market. It is the difference in the prices that the producer charges in his home market and in the U.S. market that counts. The fact that the producer lacks competition in his home market and may, because of this or for other reasons, be able to command higher prices there than in the United States, provides no defense to a charge of price discrimination. Indeed, it can be argued that the higher-priced home market sales *enable* the foreign producer to offer the lower-priced U.S. sales that injure competitors in the United States, and are thus precisely the "evil" against which the law is aimed.[8] It is claimed that if the foreign producer were to lower his home market prices to the same level as those charged in the United States, he could not afford to "dump."

The Antidumping Act takes a similarly simplistic approach to the problem of sales below "costs." It is generally not relevant to the law that producers abroad—as here—occasionally sell at a loss to preserve investments in fixed plant or because their product is affected by such natural forces as the maturation cycle of agricultural produce. More than occasional sales below fully allocated average costs, however, are mechanically incapable of constituting "fair value."[9] The statutes thus express an undeniably greater restriction on the practices of foreigners selling in the U.S. market than are applied to domestic suppliers, for U.S. producers are not likely to suffer governmentally imposed financial burdens if they sporadically sell at less than full cost as long as they do not sell below average variable cost.[10] Nevertheless, until the United States

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[7] As will be noted *infra*, *see* notes 119–124 and accompanying text, the Antidumping Act of 1916, 15 U.S.C. §§ 71–77 (1976), does require "intent to injure" as an element of both its criminal and civil offenses, but the problem of proving such intent has rendered that statute a virtual dead letter. Among recent efforts to revive it—essentially by eliminating the element of intent—is S. 938, 96th Cong. 1st Sess., 125 CONG. REC. S. 4307 (daily ed. April 10, 1979), on which generally supportive hearings were held in December 1979. *See* note 128 *infra* and accompanying text.

[8] *See, e.g.*, Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 49 (1958).

[9] *See* notes 14–20 *infra* and accompanying text for a discussion of "fair value."

[10] For a discussion of the current state of the law, see Chillicothe Sand & Gravel Co. v. Martin Marietta Corp. (7th Cir. 1980), [1980] 1 TRADE REG REP. (CCH) ¶ 63,155 (no predatory pricing or Sherman Act violation where defendants prices above average variable cost).

enters into a "common market" with its foreign trading partners, a different set of rules will be applied to foreign suppliers.

The successful invocation of these statutes results in the application of dumping or countervailing duties on future imports, with the necessary effect of increasing the price at which the affected goods enter U.S. commerce. This undoubted inflationary impact is justified by the traditional argument against predatory pricing, namely that the supply of imported dumped or subsidized merchandise is not "reliable."[11] These practices are said to destroy domestic competitors, eventually allowing the foreign producer to command prices even higher than would have prevailed with "fair competition." Thus, the theory goes, we must forgo short-run relief from inflation for long-term reliability in supply at competitive prices.

But the theory cannot be proven from the public facts. Data does not exist to demonstrate that individual determinations of dumping or subsidization, much less the mere existence of the antidumping or countervailing duty laws, have provided meaningful, preventive or remedial relief to those industries invoking the law, or that they assure long-term supplies at low prices. The steel industry has been the champion of the antidumping laws; the chemical industry is second.[12] Agricultural and textile interests have invoked the countervailing duty laws most frequently.[13] The desired aims of the law may not have been achieved. It can be argued that effective steps to stem import competition for these key sectors of the economy had to be and were fashioned *despite* and *aside from* the dumping and countervailing duty laws.

Both laws envision a key role for governments in what are generally price disputes between private companies on opposite sides

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[11] The "reliability" problem is most apparent when exporters engage in short-run or, as it has been termed, "intermittent dumping." This type of dumping is continued systematically for a limited period, is practiced in accordance with an established export policy and involves the deliberate production of commodities to be dumped. *See* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 30–31 (reprinted ed. 1966).

[12] *See* Office of Economic Analysis, U.S. Customs Service, Memorandum on Invocation of Antidumping and Countervailing Duty Legislation by U.S. Industires, at Table 1 (Oct. 12, 1979) [hereinafter cited as Customs Memo] (on file at the offices of *Law & Policy in International Business*). Of the 133 antidumping cases initiated between January 1975 and August 1979, the ferrous metals and products industry filed 36 and the industrial chemical and fertilizer producers filed 18. *Id.*

[13] *Id.* at Table 2. The textile and apparel industry initiated 30 of the 105 countervailing duty cases filed between January 1975 and August 1979, with the food industry second with 22 petitions. *Id.* The steel industry was third with 19 petitions. *Id.*

of an international boundary. This is particularly novel in the antidumping context; in a countervailing duty case it is usually the program of a foreign *government* that is attacked, and that government, therefore, has a legitimate interest in defending its actions.

Particularly since the adoption of the Trade Agreements Act, both the antidumping and countervailing duty laws have converted a process for policymakers in international trade into quasi-adjudications for customs cops. The laws have significantly adopted the trappings of litigation, leaving less room for the consideration of "extraneous" policy issues such as national security considerations or the equitable doctrine of "clean hands."

The comments that follow are on the major issues in antidumping and countervailing duty law outlined above, as affected by the new international Codes and by the Trade Agreements Act of 1979. Primary attention will be given to the concepts of preserving fair competition and protecting U.S. industry. Further areas of inquiry are the appropriate role of governments in resolving antidumping and countervailing duty disputes, and the extent to which such dispute resolutions take on an adjudicatory [illegible] under the new regime.

Preserving "Fair Competition"

Theory versus Practice

Price discrimination and subsidization can distort the "fairness" of competition in the U.S. market. It can be argued that, consistent with this idea, the original Antidumping Act of 1921[14] contemplated that a Cabinet-level official would conduct an inquiry to determine whether, as a matter of *policy*, merchandise was being sold in the United States at less than its "fair" value and that such sales were injuring or threatening the injury of a U.S. industry.[15] Significantly, the statute provided no definition of "fair value;" but if such a finding were made, the detailed calculations for imposing antidumping duties on future imports were to be made pursuant to

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[14] Antidumping Act, 1921, ch. 14, tit. II, 42 Stat. 11 (1921) (codified as amended at 19 U.S.C. §§ 160–171 (1976) (repealed by Trade Agreements Act, *supra* note 1, § 106(a).

[15] *See* 19 U.S.C. § 160 (1976) (replaced by Tariff Act of 1930, *supra* note 1, § 731) (to be codified at 19 U.S.C. § 1673)).

the exquisitely detailed Congressional descriptions of "foreign market value"[16] and "purchase price."[17]

In practice, however, the notion that the "gut" of the Treasury Secretary provided an appropriate basis for determining the "fairness" of prices for imports was increasingly abandoned. Distrust of Executive discretion, considerations of administrative convenience for overworked and understaffed Treasury personnel, importunings of industries whose petitions had been denied, and the penchant of lawyers for "certainty," have all contributed to a relentless erosion of that concept. Under the Trade Agreements Act of 1979 there can be little doubt that "fair value" means "foreign market value" (FMV)[18]—except to the extent that the shortness of time within which the fair value determination must be made prevents collection and consideration of all the data that would be needed for a true FMV calculation.[19] The practical effect of this revision is that antidumping cases generally will be "won" or "lost" in the price

[16] 19 U.S.C. § 164 (1976), (replaced by Tariff Act of 1930, *supra* note 1, § 773 (to be codified at 19 U.S.C. § 1677b)). "Foreign market value" now describes values determined both from prices and through the calculation of a "constructed value." Tariff Act of 1930, *supra* note 1, § 773 (to be codified at 19 U.S.C. § 1677b).

[17] 19 U.S.C. § 162 (1976) (replaced by Tariff Act of 1930, *supra* note 1, § 772(b) (to be codified at 19 U.S.C. § 1677a(b)). "Purchase price" is now one of the ways in which "United States price" is derived. Tariff Act of 1930, *supra* note 1, § 772(a) (to be codified at 19 U.S.C. § 1677a(a)).

[18] The House Report states: "The term fair value is not defined in current law nor in the bill. The Committee intends the concept to be applied essentially as an estimate of 'foreign market value' during the period of investigation so as to provide the Authority with greater flexibility in administration of the law." H.R. REP. No. 317, *supra* note 2, at 59. While "fair value" thus can be less precise than FMV, the methodology used to determine either must be essentially identical. *See* Antidumping Duties, 45 Fed. Reg. 8182, 8190 (1980) (to be codified at 19 C.F.R. § 353.1). The new Antidumping regulations were adopted recently by the Commerce Department. *Id.* (to be codified at 19 C.F.R. Part 353) [hereinafter cited as Antidumping Regulations].

[19] The law provides for a quick determination of fair value. Section 733(b) requires the Administering Authority to make a preliminary determination within 160 days of the initiation of his investigation as to whether there is a reasonable basis to believe or suspect that the merchandise is being sold or is likely to be sold at less than fair value. Tariff Act of 1930, *supra* note 1, § 733(b)(1) (to be codified at 19 U.S.C. § 1673b(b)(1)). The final determination is to be made within 75 days after the date of the preliminary determination. Tariff Act of 1930, *supra* note 1, § 735(a)(1) (to be codified at 19 U.S.C. § 1673d(a)(1)). Although extensions are available in extraordinary circumstances, the preliminary determination must still be made within 210 days after initiation and the final determination must be made within 135 days following the preliminary determination. Tariff Act, *supra* note 1, §§ 733(c), 735(a)(2) (to be codified at 19 U.S.C. §§ 1673b(c) and 1673d(a)(2)). For a more complete discussion of the timing of an antidumping investigation, see Lorenzen, *Technical Analysis of the Antidumping Agreement*, pp. xxxx–xxxx *infra*, at notes 152–184 and accompanying text [hereinafter cited as *Antidumping Code Analysis*].

61-219 O - 80 - 4

comparison phase, not on a very senior official's market analyses, but on a relatively junior case-handler's decisions to allow or disallow the myriad adjustments generally needed to calculate FMV.[20] These adjustments are essential to permit a fair comparison of the prices of products sold in two markets with differing consumer demands and disparate distribution organizations, not to mention separate cultures and currencies.

The Trade Act of 1974[21] introduced an important additional element to the antidumping game. Until then, the Antidumping Act had focused on *price* differences. Thereafter, the Secretary was required to consider whether significant sales in the home market were at prices that did not permit recovery of all *costs* within a reasonable period of time.[22] If so, those prices could not establish FMV—or fair value—and that critical standard was then to be derived from the remaining sales not below cost or from "constructed value."[23] This concept is fully consistent with the policy of preserving fair competition, since *persistent* sales at a loss tend to reflect a lack of the comparative advantage necessary to the maintenance of fair competition. In a contracting market, it is appropriate to limit access to the efficient and to deny access to those who cannot both compete and make a profit.

In this respect, the rationale of the antidumping law tends to merge with that of the countervailing duty law. It is not reasonable to assume that private companies can long operate at a loss at home and abroad; if they do, it must be because of some assistance provided by their governments or industries—and such aid constitutes "unfair" competition for those not so benefited. However, theory aside, many countries (including the United States) maintain industries in which excess capacity exists—often for historic, if not for "security" or "development" reasons—despite the lack of current comparative advantage.[24] The real problem is the absorption

[20] For the method of determining FMV, *see* Tariff Act, *supra* note 1, § 773 (to be codified at 19 U.S.C. § 1677b); Antidumping Regulations, *supra* note 18, subpart A, §§ 353.1–.25.

[21] Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101–2487 (1976) [hereinafter cited as Trade Act of 1974].).

[22] *Id.* § 321(d) (amending Antidumping Act of 1921, adding § 205b, codified at 19 U.S.C. § 164(b) (1976)) (replaced by Tariff Act of 1930, *supra* note 1, § 773(b), (to be codified at 19 U.S.C. § 1677b(b)).

[23] Trade Act of 1974, *supra* note 21, § 321(d). "Constructed value" is used whenever price data are legally or factually unavailable, and is the sum of the costs of materials, labor, minimum percentages thereof added for overhead and profit, and packaging. Tariff Act of 1930, *supra* note 1, § 773(e) (to be codified at 19 U.S.C. § 1677b(e)).

[24] Economic and security considerations have been invoked as a justification for the

of adjustment costs. If supply exceeds demand, will the exporting or the importing economy require its workers to seek alternative employment and homes? Which country's investors will be allowed to fight imports rather than switch investments? Whose priorities will be recognized as "fair?"

Internationally, the United States has persuaded its trading partners that persistent sales at a loss do constitute dumping,[25] that export subsidies (at least on nonagricultural commodities) by industrial countries are per se trade-distortive and that domestic subsidies, while in themselves permissible exercises of national sovereignty, have the potential for such unfair distortion.[26]

Domestically, the new U.S. law makes the most of these understandings. Despite the economic fact that in times of contracting demand *all* sellers may sell at less than fully allocated costs, and the economic theory that in such times it is sensible to sell so long as variable costs are recovered,[27] the law and what Treasury had *proposed* as implementing regulations specified the recovery of variable *and* properly allocated fixed costs in determining whether prices are below "cost."[28] In a small bow to the theory of predatory

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maintenance of a steel industry with excess and obsolete capacity. *See* Report to the President: A Comprehensive Program for the Steel Industry, at 2 (Dec. 6, 1977) [hereinafter cited as Solomon Report], *reprinted in* 17 INT'L LEGAL MATERIALS 955, 957 (1978).

[25] The GATT Committee on Anti-Dumping Practices has recognized that sales at a loss not "within the ordinary course of trade" constitute "one of the most injurious forms of dumping." *See* GATT, Committee on Anti-Dumping Practices: Priority Issues in the Anti-Dumping Field, COM. AD/W/83, at 7 (Nov. 17, 1978) [hereinafter cited as Priority Issues]. The Committee defined such sales as those that are "substantial in number, occur over an extended period of time and are at prices which would not permit the recovery of *all* costs within a reasonable period of time." *Id.* at 8 (emphasis added). It rejected the "variable" cost theory in that formulation. *See id.*

[26] *See* Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade pt. II, arts. 10–11, *done* April 12, 1979, MTN/NTM/W/236 [hereinafter cited as Subsidies and Countervailing Measures Agreement], *reprinted in* AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1, at 278–80 (1979) [hereinafter cited as MTA]. The text and footnotes of the code have been rectified in this article to comport with *id.* Rectifications to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII and the General Agreement on Tariffs and Trade, *reprinted in* MTA at 302–07.

[27] *See generally* Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Williamson, *A Preliminary Response*, 87 YALE L.J. 1353 (1978); Williamson, *Williamson on Predatory Pricing III*, 88 YALE L.J. 1183 (1979); Areeda & Turner, *Predatory Pricing: A Rejoinder*, 88 YALE L.J. 1641 (1979).

[28] Tariff Act of 1930, *supra* note 1, § 773(b) (to be codified at 19 U.S.C. § 1677b(b)); 44 Fed. Reg. 59742, 59748 (1979) (proposed regulation 19 C.F.R. § 153.7(b).

pricing, Treasury has also proposed that a practice adopted in connection with its "trigger price mechanism"[29] be extended to the general antidumping context: Fixed costs will be allocated over a period of time consistent with the investment planning cycles in the affected industry, rather than over the arbitrary "period of investigation" selected in a particular proceeding.[30] However, at the time of this writing, the Commerce Department had not adopted Treasury's proposals. These—and other "controversial" amendments to the regulations—are to receive further study.[31]

Micro-economics versus Macro-economics

The principal "reform" wrought by the Trade Agreements Act was its significant reduction in the time periods within which antidumping and countervailing duty proceedings are to be completed.[32] Moreover, new time limits were introduced for the assessment of duties[33] and for annual reviews of outstanding orders.[34] These changes respond to what irritated individual companies—both domestic and foreign—have perceived as a disin-

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[29] For a discussion of the "trigger pricing" concept, see generally Note, *Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing*, 10 LAW & POL'Y INT'L BUS. 969 (1978) [hereinafter cited as *Trigger Pricing*]; Solomon Report, *supra* note 24, at 9–20.

[30] *See* 44 Fed. Reg. 59742, 59748 (1979) (proposed regulation 19 C.F.R. § 153.7). The proposed regulation would have established one year as the norm for this purpose. *Id.* The "period of investigation" in most proceedings is a six-month period comprising the 150 days before and 30 days after the first day of the month in which an antidumping petition is filed. *See* Antidumping Regulations, *supra* note 18, § 353.38(a).

[31] *See* Antidumping Regulations, note 18 *supra*.

[32] *See* H.R. REP., No. 317, *supra* note 2, at 48; S. REP. No. 249, 96th Cong., 1st Sess. 66 (1979), [hereinafter cited as S. REP. No. 249], *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS, PT. 6A, at 74. A seven- or eight-month period is foreseen for most countervailing duty proceedings, H.R. REP. No. 317, *supra*, at 43, instead of the one-year period under prior law. Antidumping proceedings are to be concluded within 300 days, about 100 days more quickly than in the past. Moreover, the 5- to 3½-year average delay between entry of goods subject to a finding and assessment of dumping duties was criticized harshly by the Congressional committees, who directed that all assessments be concluded within a period preferably as short as 6 months but in no event more than two years after entry. Tariff Act of 1930, *supra* note 1, § 736(a) (to be codified at 19 U.S.C. § 1673e(a)). *See* H.R. REP. No. 317, *supra* note 2, at 69. The following charts reflect the new time periods:

[33] Tariff Act of 1930, *supra* note 1, §§ 706 (time period for assessment of countervailing duties), 736 (time period for assessment of antidumping duties) (to be codified at 19 U.S.C. §§ 1671e, 1673e).

[34] *Id.* § 751(a) (to be codified at 19 U.S.C. § 1675(a)). This section provides for annual review of both countervailing and antidumping duty orders. *Id.*

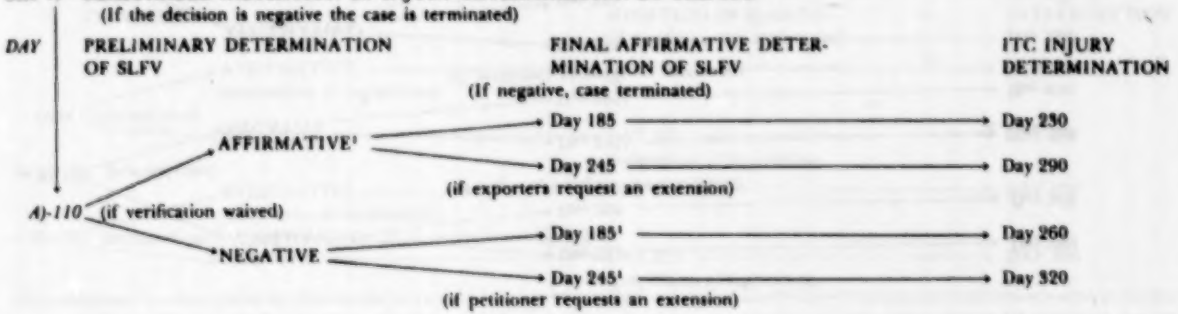
Chart 1

ANTIDUMPING CASES
(Statutory Deadlines)

DAY 1—PETITION FILED WITH THE ADMINISTERING AUTHORITY AND THE ITC
(If self-initiated by Administering Authority no action required on day 20)

DAY 20—INITIATION DECISION BY THE ADMINISTERING AUTHORITY (The ITC) is informed)
(If the decision is negative the case is terminated)

DAY 45—REASONABLE INDICATION OF INJURY DETERMINATION BY THE ITC
(If the decision is negative the case is terminated)



¹ Liquidation suspended.

Chart 2
Subsidy/CVD Cases
(Statutory Deadlines)

DAY 1—PETITION FILED WITH THE ADMINISTERING AUTHORITY AND THE ITC
(If self-initiated by Administering Authority no action required on day 20)

DAY 20—INITIATION DECISION BY THE ADMINISTERING AUTHORITY (The ITC is informed)
(If the decision is negative the case is terminated)

DAY 45—REASONABLE INDICATION OF MATERIAL INJURY DETERMINATION BY THE ITC
(If the decision is negative the case is terminated)

DAY PRELIMINARY DETERMINATION OF SUBSIDY

A)-65 (normal case)
- AFFIRMATIVE (suspension of liquidation) → DAY 160 → FINAL AFFIRMATIVE DETERMINATION OF SUBSIDY (If negative, case terminated) → DAY 205 — ITC INJURY DETERMINATION
- NEGATIVE → DAY 160 (suspension of liquidation) → DAY 235

or **B)-130** (extraordinarily complicated case or at petitioner's request)
- AFFIRMATIVE (suspension of liquidation) → DAY 225 → DAY 270
- NEGATIVE → DAY 225 (suspension of liquidation) → DAY 300

Source: These charts were developed by the Economic Bureau of the Department of State and the author during his tenure as Deputy Assistant Secretary of the Treasury (1977-1979).

terested administration of the laws by Treasury.[35] If there was lackluster "enforcement," it is in part a direct outgrowth of the micro-economic perspective with which the laws must be administered, given their minute focus on the competitive impact of imports by more than 600 individual companies subject to more than 80 dumping findings, and uncounted hundreds more subject to some 150 countervailing duty (CVD) orders.[36] The effort to keep this enormous data base current appears to have little relationship to the real trade problems of the nation and diverts resources from more significant tasks. The fact remains that substantial and continuous government effort is applied in dealing with what, under any rational standard, must be regarded as minor matters. For example, within the last two years in which Treasury administered the antidumping and countervailing duty statutes, the laws were invoked with respect to coat hangers from Canada,[37] automotive and motorcycle repair manuals from the United Kingdom,[38] ampicillin from Spain[39] and wire strand from India.[40] Although the trade affected was minuscule, none of these cases was regarded as "too small." And, to be sure, "small" cases can sometimes raise large issues. Thus, the claim that the Canadian government subsidized

[35] See, for example, the statement of Rep. John H. Buchanan, Jr., vice chairman of the Congressional Steel Caucus, lamenting "the unfortunate reticence of [the U.S.] Government to enforce the trade laws which the Congress has passed to protect this country from the deleterious effects of price discrimination in foreign commerce." *Multilateral Trade Negotiations: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 332 (1979); *Dumping: House Committee Members, Witnesses Clash Over Antidumping Enforcement for Steel*, [1980] 8 U.S. IMPORT WEEKLY (BNA), at A-1.

[36] The number of orders outstanding is derived from the lists published by the Department of Commerce in early 1980 when it adopted final regulations for administering the antidumping and countervailing duty regulations. *See* 45 Fed. Reg. 4949–52 (1980) (countervailing duty orders); 45 Fed. Reg. 8207–08 (1980) (antidumping orders). The number of companies subject to any single order may vary from one to scores, depending on the product and country. The figure cited in the text is an educated estimate based on personal experience.

[37] Steel Wire Coat and Garment Hangers from Canada, *antidumping investigation initiated*, 44 Fed. Reg. 23623 (1979); *determination of "no reasonable indication of injury or likelihood of injury,"* 44 Fed. Reg. 29990 (1979) (Inquiry No. AA1921-Inq.-25, USITC Pub. No. 974). *terminated*, 44 Fed. Reg. 35335 (1979).

[38] Automotive and Motorcycle Repair Manuals from the United Kingdom, *antidumping investigation initiated*, 43 Fed. Reg. 35139 (1978), *determination of "a reasonable indication of injury,"* 43 Fed. Reg. 40935 (1978) (Investigation No. AA1921-Inq.-19, USITC Pub. No. 913), *terminated*, 43 Fed. Reg. 45932 (1978) (termination based on provision of "Florence Agreement" that such merchandise shall be imported free of any "customs duties or other charges").

[39] Ampicillin Trihydrate from Spain, *countervailing duty investigation initiated*, 43 Fed. Reg. 22479 (1978), *countervailing duty imposed by T.D. 79–90*, 44 Fed. Reg. 17484 (1979).

the development of optic liquid level sensing devices with a grant of just over $200,000 raised the important issue of the extent to which grants characterized as for "R & D" should be subject to countervailing duties.[41] Similarly, the politically explosive claim that the Italian government "subsidized" the production and export of steel by making equity investments in a corporation experiencing operating losses was raised in a case involving what in terms of the steel trade must be considered relatively modest annual shipments of $6 million of the highly specialized grain oriented silicon metal.[42]

The conclusion is inescapable that most of the cases processed are properly regarded as pimples on the trade landscape. Nevertheless, the administering authority has no discretion to decline to investigate a claim merely because the trade affected is small, and the International Trade Commission (ITC) was loathe to terminate investigations on the basis of the abbreviated 30-day "no reasonable indication of injury" determination required by the 1974 Trade Act.[43] Under the new law, the ITC will have 45 days and an obligation to make an *affirmative* finding of "reasonable indication" of injury before the case proceeds.[44] It seems likely nevertheless

[40] Steel Wire Strand for Prestressed Concrete from India, *anti-dumping investigation initiated*, 42 Fed. Reg. 60034 (1977), *withholding of appraisement and determination of sales at less than fair value*, 43 Fed. Reg. 23672 (1978), *determination of no injury*, 43 Fed. Reg. 38951 (1978) (Investigation No. AA1921-182, USITC Pub. No. 906).

[41] Optic Liquid Level Sensing Systems from Canada, *countervailing duty investigation initiated*, 43 Fed. Reg. 3453 (1978), *countervailing duty imposed by T.D. 79-09*, 44 Fed. Reg. 1728 (1979).

[42] Grain Oriented Silicon Electrical Steel from Italy, *countervailing duty investigation initiated*, 43 Fed. Reg. 17560 (1978), *terminated*, 44 Fed. Reg. 47836 (1979) (petition withdrawn).

[43] *See* 19 U.S.C. § 160(c)(2) (1976).

[44] *See* Tariff Act of 1930, *supra* note 1, §§ 703(a), 733(a) (to be codified at 19 U.S.C. §§ 1671b(a), 1673b(a)). In the first cases to come before it under the new law, the ITC held (unanimously in all but one of the cases it considered) that such a reasonable indication did not exist. It thus terminated the investigations involving Rail Passenger Cars from Italy and Japan, *preliminary determination of "no reasonable indication of material injury"*, 45 Fed. Reg. 11942 (1980) (Investigation No. 731-TA-Sand 6, USITC Pub. No. 1034); Sodium Hydroxide from the Federal Republic of Germany, France, Italy, and the United Kingdom, *preliminary determination of "no reasonable indication of material injury"*, 45 Fed. Reg. 11617 (1980) (Investigation No. 731-TA-8, 9, 10 and 11, USITC Pub. No. 1040); Frozen Potato Products from Canada, *preliminary determination of "no reasonable indication of material injury"*, 45 Fed. Reg. 11614 (1980) (Investigation No. 701-TA-3, USITC Pub. No. 1035); Certain Chains and Parts Thereof from Japan, *preliminary determination of "no reasonable indication of material injury"*, 45 Fed. Reg. 11610 (1980) (Investigation No. 701-TA-20, USITC Pub. No. 1039). Perhaps sensing the way the Commission was viewing these cases, another petitioner withdrew its countervailing duty petition before the ITC could act. Taps, Cocks, Valves and Similar Devices from Italy and Japan, *terminated*, 45 Fed. Reg. 11620 (1980). Under the new law, the

that the grist for the antidumping and countervailing duty mills will continue to be specialty products, generally from industries having the most difficult adjustment problems. This is not to say that small businesses may not have large problems from unfairly priced or subsidized imports, or that smaller enterprises are less deserving of help than large industries. The point, however, is that encouraging intergovernmental confrontations on behalf of relatively minor economic sectors does not seem to be sensible foreign or trade policy if an acceptable alternative for the smaller sectors can be found. Private "litigation" of some type may be that alternative.

That invocation of the law has tended to be the preserve of a limited segment of the economy is highlighted by a study prepared by the Office of Economic Analysis of the Customs Service of all antidumping and countervailing duty cases initiated between 1975 and mid-1979.[45] The study confirms that just five industry groups (ferrous metals and products, textiles, industrial chemicals, rubber and plastic materials and automotive equipment) accounted for 86 of the 134 antidumping cases initiated during that period and over 90 percent of the known value of affected imports.[46] Similarly, four groups (food, textiles, leather, ferrous metals and products) and miscellaneous manufacturers) provoked 28 of the period's 108 countervailing duty investigations and accounted for over 76 percent of the value of imports affected.[47] Despite these high concentrations, the trade affected was minor in aggregate terms. This is particularly apparent when it is noted that in the cases with the largest trade volumes, no relief under the laws was ordered: the antidumping proceedings with respect to automobiles were discontinued;[48] the series of steel cases filed in 1977 was withdrawn after

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only affirmative preliminary injury determinations in the first 45 days were made. In a case the ITC had similarly declined to terminate under the Antidumping Act of 1921. Countertop Microwave Ovens from Japan, *antidumping investigation initiated*, 44 Fed. Reg. 50668 (1979), *preliminary determination of "a reasonable indication of material injury"*, 45 Fed. Reg. 11612 (1980) (Investigation No. 731-TA-4, USITC Pub. No. 1033 (1980)).

[45] Customs Memo, note 11 *supra*.

[46] *Id. See* Table 1 in the Appendix to this article.

[47] *Id. See* Table 2 in the Appendix to this article.

[48] Automobiles from Belgium, *discontinued*, 41 Fed. Reg. 34982 (1976) (discontinuance based on commitment of exporters to revise prices); Automobiles from Canada, *discontinued*, 41 Fed. Reg. 34983 (1976) (same); Automobiles from France, *discontinued*, 41 Fed. Reg. 34984 (1976) (same); Automobiles from Italy, *discontinued*, 41 Fed. Reg. 34985 (1976) (same); Automobiles from Japan, *discontinued*, 41 Fed. Reg. 34986 (1976) (same); Automobiles from Sweden, *discontinued*, 41 Fed. Reg. 43987 (1976) (same); Automobiles from the United

the adoption of the "trigger price mechanism;"[49] and most of the textile industry countervailing duty determinations were negative,[50] while the government fashioned a variety of marketing arrangements with foreign textile suppliers.[51]

Two facts stand out from over two years of on-the-job experience administering these statutes. First, most of the largest U.S. companies with significant international operations do not invoke the law, either because they do not feel that the pressure of import competition can be addressed meaningfully through these proceedings, or because they fear retaliation against their export sales. The steel and chemical companies are the sole exceptions, although steel exports are a minor factor; and, in the case of chemicals, most of the proceedings brought appear to involve relatively minor items, such as, by-products of other production processes, and not the staples of the trade. Second, when the occasional "large" cases are brought, the micro-economic approach can overwhelm the system. No better illustration exists than the infamous Japanese TV dumping case,[52] in which Treasury fell more than seven years behind in the assessment of duties due to the enormous volume of the affected trade, the number and complexity of the adjustments claimed by the several producers of a variety of different receivers sold in the two markets, and, of course, the possible efforts of some exporters and importers to evade the duties through undisclosed rebates and false invoices.[53] A significant impetus for the creation

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Kingdom, *discontinued*, 41 Fed. Reg. 34988 (1976) (same); Automobiles from West Germany, *discontinued*, 41 Fed. Reg. 34989 (1976) (same).

[49] United States Steel Corp., for example, withdrew four petitions relating to imports of steel products from Japan valued the preceding year at $1.2 billion. *See* Certain Carbon Steel Sheets, Plates, Pipes and Tubes, and Structural Products, from Japan, *terminated*, 43 Fed. Reg. 9212 (1978) (petitions withdrawn). *See also Trigger pricing* Note, *supra* note 29, at 984.

[50] *See, e.g.*, Certain Textiles and Textile Products from Malaysia, *negative determination*, 44 Fed. Reg. 41001 (1979); Certain Textiles and Textile Products from Mexico, *negative determination*, 44 Fed. Reg. 41003 (1979); Certain Textiles and Textile Products from Singapore, *negative determination*, 44 Fed. Reg. 35334 (1979). An affirmative determination was made in Certain Textiles and Textile Products from Pakistan, *countervailing duty imposed by T.D. 79-188*, 44 Fed. Reg. 40884 (1979) (duty provisionally determined to be 1 percent ad valorem).

[51] *See, e.g.*, Arrangement Regarding International Trade in Textiles, *done* Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, *extended* Dec. 14, 1977, 29 U.S.T. ___, T.I.A.S. No. 8939.

[52] Television Receiving Sets, Monochrome & Color, from Japan, *antidumping investigation initiated*, 33 Fed. Reg. 8851 (1968), *determination of sales at less than fair value*, 35 Fed. Reg. 18549 (1970), *determination of injury*, 36 Fed. Reg. 4576 (1971) (Investigation No. AA1921-66, TC Pub. No. 367), *notice of finding of dumping* (T.D. 71-76), 36 Fed. Reg. 4597 (1971).

[53] *See Oversight of the Antidumping Act of 1921: Hearings before the Subcomm. on Trade of the*

of the "trigger price mechanism" for imported steel mill products was the pendency of 19 antidumping cases—based not only on price-discrimination charges but on claims of sales below cost as well—involving virtually all of the major steel products imported from the European Community and Japan.[54]

A gesture in recognition of this problem was adopted in the Trade Agreements Act. Section 773(f) of the Tariff Act now authorizes the administering authority to use sampling and averaging techniques and to disregard minor adjustments in calculating FMV and fair value.[55] However welcome that provision will be to future administrators, it does not fundamentally alter the to-the-penny approach the statute still envisions.

Protecting United States Industry

In light of the fact that the antidumping and countervailing duty legislation has as its express purpose the prevention of "unfair competition,"[56] the concepts and conventions of competition policy ought to play a significant role in the evolution of the rules and regulations of antidumping and countervailing duty administration. In fact, although the Antitrust Division of the Justice Department has sought an increasing role as commentator and even formal participant (at least before the International Trade Commission), competition considerations are given limited scope. The statutes are clearly drafted and practically applied to protect U.S. producers[57] of merchandise from certain types of foreign competition. In that assessment, domestic conditions of competition and

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House Comm. on Ways and Means, 95th Cong., 1st Sess. 8 (1977) (statement of Robert H. Mundheim, General Counsel, U.S. Department of the Treasury).

[54] *See* Solomon Report, *supra* note 24, at 4, 10. *Trigger Pricing*, *supra* note 29, at 972.

[55] Tariff Act of 1930, *supra* note 1, § 773(f) (to be codified at 19 U.S.C. § 1677b(f)).

[56] *See* note 5 *supra* and accompanying text.

[57] Under the amendments to the Tariff Act of 1930 contained in the Trade Agreements Act, "producers" includes labor. "Interested parties" given standing to file complaints and to participate in proceedings include unions, a majority of whose members manufacture, produce or wholesale a product "like" the one imported. Tariff Act, *supra* note 1, §§ 702(b), 771(9)(D) (to be codified at 19 U.S.C. §§ 1671a(b), 1677(9)(D)). *See also* H.R. Rep. No. 317, *supra* note 2, at 50. Although the law was unclear on the issue in the past, antidumping proceedings have been initiated and pursued at the instance of labor unions. See the automobile cases listed at note 48 *supra*.

The European Community has expressed concern about the ability of labor organizations to speak "on behalf of" an industry involving the law. The GATT Antidumping Committee decided to gloss over the issue. *See* Priority Issues, *supra* note 25, at 10.

domestic levels of prices, technology and adjustment to changed consumer tastes are given short shrift.[58] The laws contain no requirement that the petitioner in particular or its industry as a whole be operated "efficiently."[59] Nor do they expose the complaining party to counterclaims for its own possible violation of trade regulation laws.[60] There is no administrative notion of "clean hands" in determining whether relief should be withheld because the domestic industry is, for example, also "dumping" in foreign countries.[61] Nor does it matter that domestic producers of a prod-

[58] Administrators of antidumping and countervailing duty laws must consider "other factors" that may cause injury. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* April 9, 1979, MTN/NTM/W/232, [hereinafter cited as Antidumping Agreement], pt. I, art. 3, para. 3, *reprinted in* MTA at 315, and the Subsidies and Countervailing Measures Agreement, *supra* note 26, pt. I, art. 6, para.3 *reprinted in* MTA at 273. (The text and footnotes of the Antidumping Code have been rectified in this article to comport with *id.* Rectifications to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *reprinted in* MTA at 334.37). The text of these very similar paragraphs is taken almost verbatim from the 1967 Antidumping Code Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* June 30, 1967, art. 3(G), 19 U.S.T. 4348, T.I.A.S. No. 6431. In issuing its proposed regulations under the Trade Agreements Act, 44 Fed. Reg. 59392 (1979), the ITC did not mention these "other factors," *see id.* at 59404 (proposed regulation 19 C.F.R. § 207.26), nor had Congress seen fit to include them in law. However, after intense criticism from several agencies in the Administration and other commentators, the ITC's final rules on injury do include a reference to the "other factors" that the Commission "will also take into account." *See* 44 Fed. Reg. 76458, 76473 (1979) (to be codified at 19 C.F.R. § 207.27).

[59] *Cf.* section 337 of the Tariff Act of 1930, 46 Stat. 703, which is directed at "[u]nfair methods of competition and . . . importation" that tend to injure a U.S. industry which is "efficiently and economically operated." 19 U.S.C. § 1337(a) (1976).

[60] In the few cases brought under the Antidumping Act of 1916, such counterclaims have not been uncommon. *See, e.g.*, Outboard Marine Corp, v. Pezetel, 474 F. Supp. 168, 179 (D. Del. 1979) (held that the Polish golf cart manufacturer and its domestic distributor's counterclaim alleging a conspiracy to submit knowingly false information to the Treasury Department and the U.S. Customs Service, resulting in assessment of dumping duties, was sufficient to state a claim under section 1 of the Sherman Act against former domestic manufacturer). The successful assertion of the counterclaim (at least to the point of surviving a motion for summary judgment) in the cited case was particularly ironic, since the court earlier had dismissed the plaintiff's complaint under the Antidumping Act of 1916 on the ground that the Polish producer, which sold its golf carts *only* in the United States, could not discriminate in the prices it charged in *two* markets. Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 408–09 (D. Del. 1978) (Antidumping Act does not provide "a private right of action to challenge activity in a single market").

[61] *See, e.g.*, Titanium Dioxide from Belgium, France, the Federal Republic of Germany, and the United Kingdom, *antidumping investigation initiated*, 43 Fed. Reg. 50781 (1978), *determination of a reasonable indication of injury*, (Inquiry No. AA1921-Inq.-23, USITC Pub. No. 930) *See* 44 Fed. Reg. 47196 (1979), *withholding of appraisement and determination of sales at less than fair value*, 44 Fed. Reg. 47196 (1979), *determination of no injury*, 44 Fed. Reg. 66997 (1979) (Investigation Nos. AA1921-206, 207, 208, 209, USITC Pub. No. 1009). This case was brought by U.S. producers who were at the same time the subjects of an Australian

uct (such as winter vegetables) occasionally sell portions of their output below fully allocated costs, while claiming that similar selling techniques by foreign exporters constitute dumping.[62]

The Codes recently concluded in Geneva require that antidumping and countervailing duty proceedings be brought "by or on behalf of the industry."[63] U.S. law now mirrors those requirements.[64] In the past, most complaints were filed by individual companies and not by coalitions of concerns constituting an "industry." Indeed, there may have been and will always be an understandable skittishness by domestic companies about pooling their resources to bring a joint action against foreign competitors; the Trade Agreements Act provides no immunity against antitrust claims.[65] During consideration of the Administration's proposals for what became the Trade Agreements Act, the Senate Finance Committee was concerned about individual company complaints potentially being unrepresentative of the industry as a whole, and suggested that each petitioner be required to deposit a $5,000 bond that would be forfeited if the Administering Authority determined the complaint to be frivolous.[66] The House Trade Subcommittee objected to this increased burden on individual complainants, however, and the proposal was stricken from the joint House–Senate recommendations to the Administration used in preparing the new law.[67] Today, individual small companies can and do claim to be an

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antidumping proceeding regarding exports of the same product from the United States and the Federal Republic of Germany. See Ministerial Direction im Respect of Normal Value for Titanium Dioxide imports From the Federal Republic of Germany in the United States of America (notices 1979-D20, D21), *reprinted in* [1979] SPECIAL COMMONWEALTH OF AUSTRALIA GAZETTE S203 (Oct. 9, 1979).

[62] *See* Berry, *Mexican Growers Tentatively Clear in Vegetable Dumping*, Wash. Post, Oct. 31, 1979, at A27, col. 1.

[63] Antidumping Agreement, *supra* note 58, pt. I, art. 5, para. 1, *reprinted in* MTA at 317; Subsidies and Countervailing Measures Agreement, *supra* note 26, *reprinted in* MTA at 261.

[64] The Tariff Act of 1930, as amended by the Trade Agreements Act, now states: "An antidumping proceeding shall be commenced whenever an interested party . . . files a petition with the administering authority, *on behalf of an industry*, which alleges the elements necessary for the imposition of the duty . . . " (emphasis added). Tariff Act of 1930, *supra* note 1, § 732(b)(1) (to be codified at 19 U.S.C. § 1673a(b)(1)).

[65] Of course, under the *Noerr-Pennington* doctrine, the mere joint invocation of legal procedures against competitors is likely to be protected by the First Amendment, Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136–38 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 669–70 (1965), unless the proceedings constitute a "sham" used to harass the competition, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515–16 (1972).

[66] Senate Comm. on Finance, Press Release No. 107, at 1. (Mar. 8, 1979).

[67] "Petitioners shall not be required to post a bond or cash deposit as a prerequisite to

"industry," making, for example, "butter cookies" or "optic liquid level sensing devices" or "marine radar systems"—products discrete enough so that single firms can claim to speak for, if not "be," the industry producing the product "like" the import.[68] On the other hand, to the extent that the old law might have permitted producers of one product to complain about imports of a concededly different (although competitive) or more or less fabricated item,[69] the new law should be more restrictive.

The concept that it is individual companies that deserve protection is also evident in the new statutory provisions concerning "regional injury."[70] The Tariff Commission had developed the theory that injury to a regionally important sector of an entire domestic industry could constitute injury to the entire national industry.[71] The European Economic Community has recently come

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filing a petition." Senate Comm. on Finance & House Comm. on Ways and Means, Joint Press Release No. 1, at 1. (May 24, 1979).

[68] In the first cases decided by the ITC under the new law, the Commission was faced with single companies claiming to speak "on behalf of the industry." It was an apparently significant fact in the two negative preleminary antidumpnig determinations that the petitioners were not supported by any other producers of "like" products. Sodium Hydroxide from the Federal Republic of Germany, France, Italy and the United Kingdom, *Preliminary determination of "no reasonable indication of material injury,"* 45 Fed. Reg. 11617, 11618 (1980) (investigation No. 731-TA-8, 9, 10 and 11, USITC Pub. No. 1040); Rail Passenger Cars From Italy and Japan, *Preliminary determination of "no reasonable indication of material injury,"* 45 Fed. Reg. 11942, 11943 (1980) (Investigation No. 731-TA 5 and 6, USITC Rule No. 1034).

[69] For example, in the recent antidumping investigation with respect to West German coke, Coke from the Federal Republic of Germany, *antidumping investigation initiated*, 44 Fed. Reg. 60838 (1979), Treasury noted that coke imports may not have been injuring the complaintants who were largely producers of coking coal. *Id.* The ITC then unanimously terminated the investigation on the basis that there was no reasonable indication that any U.S. industry was being injured by the importation of coke. 44 Fed. Reg. 67544 (1979) (Inquiry No. AA1921-Inq.-29, USITC Pub. No. 1015).

[70] *See* Tariff Act of 1930, *supra* note 1, § 771(4)(C) (to be codified at 19 U.S.C. § 1677(4)(C)).

[71] *See, e.g.*, Cast Iron Soil Pipe from Poland, *antidumping investigation initiated*, 32 Fed. Reg. 8396 (1967), *determination of injury*, 32 Fed. Reg. 12925 (1967) (Investigation No. AA1921-50, TC Pub. No. 214). In *Cast Iron Soil Pipe*, an equally divided panel of Tariff Commissioners found that the sale of imported pipe at less than fair value in a confined geographic area representing less than one-fifth of the total U.S. market for such pipe constituted "injury" to an "industry." The principal opinion concluded that "imported cast iron soil pipe from Poland is causing material injury to the nationwide domestic industry that produces comparable pipe in that it has suffered a substantial depression in prices in one of its large markets described . . . as the northeastern market area [the area between New York and Philadelphia]." 32 Fed. Reg. 12926. A concurring opinion observed that the Polish imports amounted to only 4 percent of the sales in the Northeastern market. *Id.* at 12928 (Club, Commissioner, concurring).

to recognize this notion as important to its own administration of antidumping measures.[72] The Codes on both antidumping and countervailing duties permit injury determinations on the basis of regional industries,[73] although the language of the Codes (and section 771(4)(C) of the Tariff Act implementing them) may have been drawn somewhat more restrictively than its sponsors realized. Application of the concept is now limited to situations in which the producers within the market "sell all or almost all of their production of the like product in question in that market" *and* "the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States."[74] It is not clear that the affirmative determination of injury in the recent case of *Carbon Steel Plate from Taiwan*,[75] based on the pre-Code, looser standards of "regional industry," could be made under the new concept.

Notwithstanding the possible oversight in drafting the "industry" definition, it seems clear that a "protective" mood prompted Congress to adopt the essential reforms of the 1979 law—acceleration of the time within which investigations are to be completed and expansion of judicial review of both interlocutory and final decisions. It did so without any serious study of the impact of the existing laws on domestic industry, much less of whether accelerated and necessarily more arbitrary decisionmaking would provide meaningful relief to those who had invoked the laws and sought their change. As noted earlier, the laws have been invoked by relatively few industries,[76] yet statistics concerning the impact of proceedings on their businesses remain uncollected and unstudied.[77]

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[72] See Council Regulation (EC) No. 3017/79, 22 O.J. Eur. Comm. (No L-339) 1 (1979).

[73] Antidumping Agreement, *supra* note 58, pt. 1, art. 4, para. 1, *reprinted in* MTA at 316; Subsidies and Countervailing Measures Agreement, *supra* note 26, pt. 1, art. 6, para. 7, *reprinted in* MTA at 274–75.

[74] Tariff Act of 1930, *supra* note 1, § 771(4)(C) (i)–(ii) (to be codified at 19 U.S.C. § 1677(4)(C)(i)–(ii)). *See also* note 72 *supra*.

[75] Carbon Steel Plate from Taiwan, *determination of injury*, 44 Fed. Reg. 29734 (1979) (Investigation No. AA1921-197, USITC Pub. No. 970).

[76] *See* notes 46–47 *supra* and accompanying text.

[77] *See* U.S. General Accounting Office, U.S. Administration of the Antidumping Act of 1921: Report to the Congress by the Comptroller General 11 (March 15, 1979) [hereinafter cited as GAO Report]. The ITC has the statutory power to make such investigations, *see* 19 U.S.C. § 1332(a) (1976), but has never exercised it with respect to the effectiveness of the Antidumping Act of 1921. GAO Report, *supra*, at 11. Similarly, there has been no study of the effect of the countervailing duty statute that dates from 1897.

The fashionable claim of domestic industry has been that exporters generally accelerate shipments when an antidumping proceeding is initiated in order to "beat" the subsequent withholding of appraisement notice.[78] A report published by the General Accounting Office in 1979 found this worrisome pattern seven times in the 17 cases it studied.[79] To underscore Congress' concern with the possible problem of increased shipments pending withholding of appraisement, the law now contains elaborate procedures for the retroactive application of both dumping and countervailing duties when such "critical circumstances" are demonstrated.[80]

It is equally fashionable for foreigners to contend that the mere publication of a notice that a proceeding has been initiated immediately "chills" the trade in question so that further orders can be booked only with great difficulty, and that the publication of a "Withholding of Appraisement Notice" serves to impose a virtual embargo on imports.[81] But, again, the GAO Report could not demonstrate the accuracy of such claims.[82] Trade in some commodities subject to proceedings did cease immediately; in others it continued unabated through each stage from initiation through finding and beyond.[83]

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[78] *See* GAO REPORT, *supra* note 77, at 9. Spokesmen for various domestic industries also complained of the average delay of 3½ years in the actual assessment of duties in most cases. *See id.* at 10. Both import practitioners and the Customs Service generally agree that—with the possible exception of the seven year-long case of *Television Receivers from Japan*, in which fraudulent invoicing and rebating has been suspected, *see* notes 52–53 *supra* and accompanying text—exporters commonly revise prices to avoid the imposition of antidumping duties. As a result few, if any, collections were generated despite great effort and expense. The prophylactic effect on the individual respondents—or others possibly tempted to "dump"—has not been considered in assessing whether the entire proceeding was useful and cost-effective. Nevertheless, because importers do tend to revise prices rather than pay duties, the collection phases of the old law were generally allowed to languish, and—again with the exception of the case of *Television Receivers from Japan*—it is impossible to determine either how much in duties has been collected in prior years or how much should now be assessed. Efforts to collect this type of information were in the process of being initiated within the Customs Service when the President decided to reorganize the function out of the Treasury.

[79] GAO REPORT, *supra* note 77, at 9–10.

[80] *See* Tariff Act of 1930, *supra* note 1, §§ 703(e), 733(e) (to be codified at 19 U.S.C. §§ 1671b(e), 1673b(e)).

[81] GAO REPORT, *supra* note 77, at 9.

[82] *Id.* "While there seems to be a general consensus that investigations create uncertainty in the marketplace, forcing some adjustments in prices and/or quantities, there is no empirical evidence of what actually occurs during the various phases of antidumping investigations." *Id.*

[83] *See id.*, app. II at 76.

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The new requirement of § 751(a) of the Tariff Act[84] that the Administering Authority conduct an annual redetermination of the dumping and subsidy issues in outstanding cases should at last create the needed impetus for systematic and current collection of the facts. With the enhanced resources that Congress provided to the Commerce Department when it became the Administering Authority,[85] we may know in a few years whether these laws are serving the U.S. economy well by shielding domestic industries from "unfairly" priced products, or are simply providing employment for the platoons of lawyers whose services will be essential to those enmeshed in the new procedures.

Despite these criticisms of the protective character of the law, it is nevertheless evident that some such shelter is *politically* necessary. Intellectually, an open trading system based solely on comparative advantage may be preferable. But a system of comparative advantage on a global scale requires two-way–nay, forty-way–trading. It demands that U.S. exports be assured access to foreign markets no less than that foreigners' goods be allowed competitive footing in the United States. To achieve that aim, a few sticks must be applied along with the carrots offered. U.S. strategy in negotiating the MTA Codes and in enacting the Trade Agreements Act followed that design. It will not do for the United States simply to provide the world with a market. The United States too has problems of adjustment, of balance of payments deficits and of security needs, overriding the long-term goal of equal economic opportunities for all. In a very real sense, the United States must, at least for the time being, cling to the present rules, because it cannot be convinced that giving them up will not be even worse, that others will not abuse its free market without providing any long-term economic benefit to U.S. consumers or opening their own markets to the comparatively advantageous output of U.S. factories and fields. What remains open to question is whether the new Act's *procedures* are best suited to achieving the long-run aims of the United States.

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[84] Tariff Act of 1930, *supra* note 1, § 751(a) (to be codified at 19 U.S.C. § 1675(a)).

[85] Treasury Department Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 539, authorized funds for 130 new positions for antidumping and countervailing duty administration, *see* S. REP. No. 299, 96th Cong., 1st Sess. 14 (1979), compared to the 79 positions working in that area (including a large group solely devoted to the Trigger Price Mechanism) that were transferred from Treasury to Commerce pursuant to section 2(a) of Presidential Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273, 69274 (1979).

Government Involvement

Antidumping cases are, in essence, disputes between private parties concerning their respective behavior in the U.S. market. The fact that some foreign exporters are government-owned ought not be relevant; U.S. law generally denies any special recognition to such enterprises.[88] Government-owned enterprises are subject to the same types of pricing discipline as their privately-owned counterparts, and conversely, they are entitled to no less stringent rules governing their market behavior. Despite the fact that, in form, the antidumping remedy is sought by one private company against another, antidumping proceedings have in the past involved substantial government participation on the side of the *domestic* industry invoking the laws. Not surprisingly, this government participation has, in part, tended to provoke government involvement on behalf of respondents.

That the government of the importing country should have a role in the proceedings is, perhaps, not surprising. Without government participation, it might be difficult to serve "process" on the foreign companies participating in the alleged dumping practices. The ordinary procedures of litigation may permit foreigners to contest at length the jurisdiction of the forums of the importing country and thus effectively forestall remedial steps. Moreover, domestic companies invoking the laws are frequently thought to be unable, financially and otherwise, to collect the substantial volumes of data required to determine whether foreign companies are indeed selling at less than fair value on either a price or cost basis. Of course, no "verification"—even to the limited extent that that practice is followed by U.S. authorities—would likely be permitted to private companies or their lawyers or accountants by most foreign respondents charged with the practice of dumping. Finally, and perhaps quite fundamentally, even if it were desirable to treat the dumping dispute as a private matter, many governments, the United States not excluded, are concerned not only with imports and exports as a matter of national policy, but also with protecting their industries from perceived arbitrary or inappropriate actions by foreign governments or citizens. Therefore, a significant degree of government involvement seems inevitable on behalf of the petitioning industry.

[88] *See, e.g.*, Foreign Sovereign Immunities Act of 1976 28 U.S.C. §§ 1602–1611 (1976); *see especially id.* § 1605(a)(2), the "commercial activity" clause. *See also id.* § 1603(d), (e).

On the other hand, there seems to be less need for governments to rally round the respondents. In the past, the United States has not concerned itself with foreign antidumping and countervailing duty proceedings brought with regard to U.S. exports. Only the authorities of Canada and Australia have conducted significant numbers of proceedings affecting U.S. products,[87] and it has only been in the last few years that U.S. authorities have come to an awareness of some of the procedural infirmities in those countries' proceedings. This is due chiefly to the fact that, as a rule, U.S. companies involved in foreign proceedings have elected not to call their problems to the attention of the U.S. government. Foreign firms, on the other hand, seem to be far less reticent about invoking the aid of their governments in U.S. proceedings.

To the extent that most antidumping and countervailing duty cases are, in fact, peripheral to the basic trade or competition policy of both nations and the "big" cases cannot and are not adequately handled under these laws, the frequency of governmental face-offs thus created seems needlessly irritating to good international relations. Alternatives should be explored. One alternative might involve proceedings conducted essentially as private litigation, with government participation limited to providing an impartial arbiter. The problem this suggestion raises is how government aid can be limited to those functions if the claim is made that government assistance is needed in the collection and verification of data. These types of issues should probably be studied in connection with providing more attractive domestic private remedies, such as a simple

[87] Between July 1976 and June 1977, Canada initiated nine antidumping proceedings against U.S. firms, with six of these resulting in antidumping orders and three being terminated. COMMITTEE ON ANTI-DUMPING PRACTICES, GENERAL AGREEMENT ON TARIFFS AND TRADE, REPORTS (1977) ON THE ADMINISTRATION OF ANTI-DUMPING LAWS AND REGULATIONS, COM.AD/44, at 8–12. During this same period, Australia initiated six cases, five of which were terminated. *Id.* at 2–6. Between July 1977 and June 1978, Canda initiated eight cases, with four terminated, three ending in antidumping orders and one still pending. COMMITTEE ON ANTI-DUMPING PRACTICES, GENERAL AGREEMENT ON TARIFFS AND TRADE, REPORTS (1978) ON THE ADMINISTRATION OF ANTI-DUMPING LAWS AND REGULATIONS, COM.AD/49/Add. 1, at 1–7. Australian cases during this period numbered four, with three resolved through price undertakings and one still pending. COMMITTEE ON ANTI-DUMPING PRACTICES, GENERAL AGREEMENT ON TARIFFS AND TRADE, REPORTS (1978) ON THE ADMINISTRATION OF ANTI-DUMPING LAWS AND REGULATIONS, COM.AD/49, at 2–7. In the period between July 1978 and June 1979, nine Canadian cases were filed; as of June 30, 1979, one had been terminated, one has resulted in an affirmative finding of dumping and seven were still pending. COMMITTEE ON ANTI-DUMPING PRACTICES, GENERAL AGREEMENT ON TARIFFS AND TRADE, REPORTS (1979) ON THE ADMINISTRATION OF ANTI-DUMPING LAWS AND REGULATIONS, COM.AD/52/Add. 1, at 1–6.

private damage action in a court that may not be able to consider all of the normal antitrust counterclaims that otherwise would bedevil private proceedings. Of course, it may be argued that private parties invoking the traditional procedures of litigation should not be shielded from counterclaims merely because their cases involve foreign unfair trade practices—they have no such shield from domestic defendants.

Moreover, if it is conceded that the government-operated method of dealing with dumping and subsidy complaints under the existing statute does not adequately cope with the "big" cases, it would seem even more clear that private lawsuits could not fill that bill. And how could one adequately distinguish the "big" from the "ordinary" case, relegating the latter to private ligitation while reserving the former to active government participation? In that connection, it must be borne in mind that even products affecting limited amounts of trade may raise the largest issues in international relations. The antidumping proceeding with respect to *Golf Cars from Poland,*[88] although seemingly insignificant in terms of overall world trade, may be important to the Polish government or to the principles of East-West trade more generally. So too, the $200,000 government grant to Honeywell Ltd. of Canada to assist in the development of its optic liquid level sensing devices raised profound questions as to the appropriate reach of countervailing duty law.[89]

It may be that countervailing duty cases are, by nature, different, in that they address foreign government programs. For that reason, presumably, countervailing duty cases have traditionally been handled as essentially government-to-government matters; indeed, in most instances, the affected industries have not even entered the proceedings.[90] However, to the extent that the International Trade

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[88] Electric Golf Cars from Poland, *antidumping investigation initiated,* 39 Fed. Reg. 20815 (1974), *withholding of appraisement,* 40 Fed. Reg. 11917 (1975), *determination of sales at less than fair value,* 40 Fed. Reg. 25497 (1975), *determination of injury,* 40 Fed. Reg. 49153 (1975) (Investigation No. AA1921-147, USITC Pub. No. 740), *notice of finding of dumping* (T.D. 75–288), 40 Fed. Reg. 53383 (1975). *See* Note, *Dumping from 'Controlled Economy' Countries: The Polish Golf Car Case,* 11 LAW & POL'Y INT'L. BUS. 777 (1979); Note, *Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations,* 128 U. PA. L. REV. 217 (1979).

[89] *See* note 41 *supra* and accompanying text.

[90] *But see* X-Radial Steel Belted Tires from Canada, *countervailing duty investigation initiated,* 37 Fed. Reg. 9568 (1972), *countervailing duty imposed by T.D. 73-10* 38 Fed. Reg. 1018 (1973)

Commission will begin to consider the injurious effect of subsidies,[91] it is clear that individual companies *must* play a role, for only they know the extent to which they actually utilize subsidy programs offered by their governments. The law does not countervail products merely *eligible* for a benefit; the benefit must actually be obtained, used and applied to the product exported, and must cause or threaten injury.[92] Moreover, to the extent that injury to a domestic industry consists of undercutting the domestic price level and taking customers from domestic producers, only individual companies will be able to provide the necessary data on their prices and the customers to whom their wares have been offered.[93]

Curiously, just as this type of information is being solicited for the first time from foreign governments and firms to enable the ITC to conduct the numerous injury determinations it will be required to make under the transition rules of the Trade Agreements Act,[94] concern has been expressed by a number of foreign governments about the propriety and the desirability of collecting and transmitting such information to the ITC. Experience in both this phase of prior proceedings as well as in proceedings before the Treasury Department, however, would appear to bear out the generalization that a company is almost always helped by providing information concerning its activities; the company that declines to provide data—as it has every right to do—is most likely to find its fate decided upon the information submitted by the opposing side

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(duty provisionally determined to be 6.6% percent of the F.O.B. value of each tire); Optic Liquid Level Sensing Systems from Canada, *supra* note 41, in each of which only one firm's products were involved, and that company participated actively.

[91] Tariff Act of 1930, *supra* note 1, § 705(b) (to be codified at 19 U.S.C. § 1671d(b)).

[92] *See id.* § 701(a) (to be codified at 19 U.S.C. § 1671(a)). *See also* 44 Fed. Reg. 57044, 57047 (1979) (proposed regulation 19 C.F.R. § 155.2(b)) ("A subsidy . . . shall be considered as such only to the extent that it is, in fact, utilized by the enterprise . . . ."). The same concept was included in proposed regulation 19 C.F.R. § 155.4(a). *Id.* These proposed regulations were not included in the final regulations published by the Department of Commerce on Jan. 22, 1980. 45 Fed. Reg. 4932 (1980). The Commerce Department decided to defer publication of final regulations for the proposed subpart A, of which sections 155.2 and 155.4 were a part. *Id.*

[93] In its initial negative preliminary injury determinations, the ITC noted the incompleteness of this type of data from the foreign *respondents*, Frozen Potato Products from Canada, *preliminary determination of "no reasonable indication of material injury,"* 45 Fed. Reg. 11614, 11615 (1980), 2nd held against a *petitioner* trade association and its members that provided no such data. Certain Chains and Parts Thereof From Japan, *preliminary determination of "no reasonable indication of material injury,"* 45 Fed. Reg. 11610, 11611 (1980).

[94] Trade Agreements Act, *supra* note 1, § 104 (to be codified at 19 U.S.C. § 1671 note).

or the less reliable and less specific information available in the public domain.[95]

The Trade Agreements Act has, in fact, provided extensive new opportunities for government involvement in antidumping and countervailing duty proceedings. For example, the Tariff Act now expressly provides for the termination and suspension of countervailing duty investigations based upon agreements of exporters or foreign governments to revise prices or renounce subsidies within six months after the suspension.[96] Indeed, agreements to restrict the quantity of subsidized imports *must* be executed by the exporter's government in order to furnish a basis for termination.[97] Foreign governments are also among the "interested parties" established by the statute,[98] and thus are given unprecedented opportunity for access to the courts. Under the judicial review title of the Trade Agreements Act,[99] a foreign government now has standing to bring a legal proceeding in U.S. courts against the United States government on grounds, *inter alia,* that an action of a U.S. administrative agency was contrary to U.S. law.[100] While those involved in international legal affairs may welcome this open-minded attitude and, indeed, find it consistent with the underlying rationale of the Foreign Sovereign Immunities Act[101] and the decision of the Supreme Court in *Pfizer Inc. v. Government of India,*[102] it remains an

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[95] In its first decision under the new law, three Commissioners noted their obligation to render a determination on the merits notwithstanding the failure of a party—in this case, the petitioner—to present evidence Certain Chains and Parts Thereof From Japan, *Preliminary determination of "no reasonable indication or material in jury,"* 45 Fed. Reg. 11610, 11611–12 (1980) (additional views of Commissioners Alberger, Stein and Calhoun).

[96] Tariff Act of 1930, *supra* note 1, § 704(b), (c) (to be codified at 19 U.S.C. § 1671c(b), (c)). *Cf. id.* § 734 (to be codified at 19 U.S.C. § 1673c) (corresponding provision relating to antidumping investigations).

[97] *Id.* § 704(c)(3). *See* H.R. REP., *supra* note 2, at 54.

[98] Tariff Act of 1930, *supra* note 1, sec. 771(9)(B) (to be codified at 19 U.S.C. § 1677(9)(B)).

[99] Tariff Act of 1930, *supra* note 1, § 516A, *added by* Trade Agreements Act, *supra* note 1, § 1001(a),1(to be codified at 19 U.S.C. § 1516a(a)) [hereinafter cited as Judicial Review Provisions].

[100] All "interested parties" have the right to petition for judicial review before the U.S. Customs Court. Judicial Review Provisions, *supra* note 97, § 516A(d) (to be codified at 19 U.S.C. § 1516a(d)).

[101] 28 U.S.C. §§ 1602-1611 (1976). *See* note 86 *supra.*

[102] 434 U.S. 308, 320, *rehearing denied,* 435 U.S. 910 (1978) (foreign nations have standing to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976)). For a discussion of the *Pfizer* decision, see generally Houser & Rigler, *Antitrust and the Foreign Government Trader: The Impact of Pfizer Inc. v. Government of India,* 11 LAW & POL'Y INT'L BUS. 719 (1979).

unusual innovation in a statute in which new concessions to foreign governments are scarce.

Executive Order 12188 ("International Trade Functions")[103] further encourages this development by designating the newly denominated United States Trade Representative as the U.S. government's negotiator and policy coordinator to deal with foreign governments in the resolution of antidumping and countervailing duty cases.[104]

In sum, the new law is likely to generate more intense and frequent government involvement on both sides of the table. It is a development of questionable utility and merit, at least in the dumping area.

The Trend Toward "Adjudications"

Proceedings under the antidumping and countervailing duty laws can be viewed as either adjudicatory or quasi-legislative in nature. Which paradigm is chosen depends largely on which elements of the proceedings are stressed.

The Case for "Adjudicatory Proceedings"

One not totally inaccurate picture of the antidumping and countervailing duty regime shows an interested party invoking the procedure, attempting to establish entitlement to relief under standards articulated in the statute and regulations, and receiving a relatively "mechanical" decision from the government—granting or denying relief on the basis of the established record. No consideration is given to such extrinsic factors as the broader trade relations of the United States with the affected country, the possibility that the proceedings may be brought with respect to imports from a country that may not even be the primary source of the "problem," the fact that nontrade related relationships with the exporting country are currently "critical" (*e.g.*, the United States seeks to establish military bases there), that efforts at solutions are presently under way in other forums (*e.g.*, the OECD Steel Committee), or that the case raises domestic policy questions relating to competition in the industry or the effort to curb inflation. This is

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[103] 45 Fed. Reg. 989 (1980).

[104] *Id.* §§ 1-101(a)(5).

the approach that has traditionally been favored by U.S. industry and, in recent years, the Congress.

If the proceedings are essentially adjudicatory, there is little purpose or need for extensive interagency consideration of proposed decisions by the administrator. Indeed, it can be argued that if the proceedings are properly adjudicatory, the decisionmaker ought to be *insulated* from extrinsic influences, such as those the Departments of State or Labor may consider relevant. By the same reasoning, the administrator should not have other responsibilities in trade policy matters within his own agency.

If the proceedings are "adjudicatory," there is also substantially less room for broad brush approaches to such technical dumping issues as the determination of "fair value," the scope of the affected industry and the calculation of actual duties to be paid. An adjudicatory system invites formal, adversary proceedings, in which the traditions of U.S. litigation will result in, and require, extensive factfinding, detailed verification of claims, confrontation hearings, detailed calculations of margins and extensive judicial review. Such a system could not operate with the resources previously dedicated to the task. Substantial increases would be needed in the number and quality of the government's investigators and analysts and in the personnel required to review the results of such investigations and to render principled decisions that can withstand the expanded judicial review that such a system would generate.

Unfortunately, as already noted,[105] empirical data are not presently available to demonstrate that such a system would be more effective in achieving the aims of the law than the system that has prevailed in the 80 years since the countervailing duty law was enacted or the nearly 60 years of antidumping administration. We do not know (except to the limited extent that the Japanese TV case suggests the remedy of the law was not effective when exporters sought to evade it) how well the United States has shielded domestic industries from "injury" caused by "unfairly" priced merchandise. There is probably a prophylactic effect merely because the law exists, whether or not applied; its occasional invocation may have deterrent effects, although the facts are not clear that it does. The largest industries that have invoked the laws in recent years—steel, television receivers, automobiles, dairy products and

[105] *See* note 77 *supra* and accompanying text.

textiles[106]—have all found that the individualized country-by-country, product-by-product approach of the statutes, as applied by Treasury, tends not to solve the import problems about which complaints were made.[107] Therefore, the ultimate results of those cases have *not* been within the narrow adjudicatory framework foreseen by the antidumping and countervailing duty laws.

Antidumping and countervailing duty actions actually brought to conclusion have generally been peripheral to major economic concerns. For such relatively minor items, an adjudicatory procedure is workable and appropriate. But if the types of cases for which those laws are proper are, in fact, only those of peripheral concern to the U.S. economy, it is appropriate to ask whether the enormous relative increase in resources needed to administer an adjudicatory process as now contemplated is worthwhile. According to recent GAO estimates, the traditional program cost $1.1 million in 1975, $1.4 million in 1976, and $1.1 million in 1977.[108] The cost of the trigger price mechanism (for monitoring steel mill products imports), which was estimated at $1.9 million in 1978, resulted in more than a doubling of these costs—to a total of $3.9 million—within a single year.[109] The amount and type of manpower needed properly to investigate, adjudicate and then "enforce" the new laws within the tightened time limits and in light of increased caseloads, may require a further fourfold increase in those costs.[110]

The Case for "Rulemaking Proceedings"

Alternatively, the process can be viewed as in the nature of "rulemaking." Under this model, an interested party invokes a procedure that has as its main purpose a determination by the government, *qua* sovereign, as to whether action is appropriate in light of *all* of the government's interests. Naturally, those interests range far beyond the avoidance of injury to any particular producer, or even an industry—even one as essential to the economy as steel or automobiles.

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[106] *See* notes 46–47 *supra* and accompanying text.

[107] *See, e.g., Multilateral Trade Negotiations: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 305–15 (1979) (statement of Morton Cooper, Past President, National Outerwear & Sportswear Association).

[108] GAO REPORT, *supra* note 77, at 4.

[109] *Id.*

[110] *See* note 85 *supra*.

A review of the antidumping procedures used by the European Community (EC)[111] in 1977-78 with respect to U.S. exports of kraft liner paper and board graphically illustrates how this alternative approach functions in the EC. The complainants first had to convince their own governments to press the case before the Community; before invoking the law, the latter considered whether other member states would be able to continue to obtain access to inexpensive imports from the United States.[112] The administrators decided that imports from the United States were not the only source of the problems faced (primarily by the French), and thus prompted the initiation of proceedings against imports from Sweden and other countries; these proceedings, however, were later terminated when the exporters agreed to provide price assurances.[113] The ultimate decision was to impose an apparently arbitrarily derived "normal value" on U.S. exports.[114] This value is probably less for some exporters than the actual "fair value" under the standards mandated by U.S. law, but more than that level for other exporters. To assure access by traditional suppliers, "normal values" were determined in part by reference to domestic price levels within the EC as well as models of desired allocations of market shares.[115] These are all practices studiously avoided by the administrators of the U.S. law.

In the EC's style of administration, considerably fewer resources are needed; in fact, the EC administers its programs with a very

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[111] *See generally* Ehle, *Basic Aspects of the Anti-Dumping Regulations of the Common Market*, 3 INT'L LAW. 490 (1969); Van Bael, *The E.E.C. Antidumping Rles—A Practical Approach*, 12 INT'L LAW. 523 (1978) [hereinafter cited as Van Bael].

[112] The European Confederation of Pulp, Paper and Board Industries (CEPAC) submitted a final complaint to the Commission of European Communities on Nov. 29, 1977. On Dec. 5, 1977, the Antidumping Committee consulted on the advisability of opening the procedures; the case was officially opened on Dec. 17, 1977.

[113] Kraft Liner from Sweden, Finland, Canada, Portugal and Austria, *antidumping investigation initiated*, 21 O.J. EUR. COMM. (No. C 54) 2 (1978), *terminated*, O.J. EUR. COMM. (No. C 61) 2 (Sweden, Finland, Portugal and Austria), (No. C 69) 2 (Canada) (1978); Kraft Liner from the Soviet Union, *antidumping investigation initiated*, 21 O.J. EUR. COMM. (No. C 105) 5 (1978), *terminated*, 21 O.J. EUR. COMM. (No. C 174) 2 (1978). All of these proceedings were terminated after the exporters involved voluntarily undertook to revise prices to satisfactory levels. Council Regulation (EC) No. 2133/78, 21 O.J. EUR. COMM. (No. L 247) 22, 23 (1978).

[114] Council Regulation (EC) No. 2133/78, 21 O.J. EUR. COMM. (No. L 247) 22 (1978), *as amended by* Council Regulation (EEC) No. 572/79, 22 O.J. EUR. COMM. (No. L 77) 1 (1979) (imposition of definitive antidumping duty on kraft liner paper and board originating in the United States).

[115] *See* Council Regulation (EC) No. 2133/78 21 O.J. EUR. COMM. (No. L 247) 23.

small staff.[116] Such proceedings can be concluded much more quickly, or can be prolonged if the government has "good reasons." The petitioning industry may obtain relief faster and with much less effort, or it may be denied relief entirely. It is a system contrary to traditional U.S. approaches, even in the rulemaking mode, and gives to the administrators more discretion than Congress would probably be prepared to give the Executive, regardless of the departmental identity of the administrator.

There is reason to believe that, at least with respect to the Antidumping Act, this is precisely the type of administration that the original draftsmen of the U.S. law envisioned. Congress carefully gave to a Cabinet-level officer the initial responsibility for determining whether merchandise was being sold in the United States at less than "fair value."[117] The draftsmen must have realized that the initiation of proceedings just *might* have important international trade and domestic competitive effects and that, therefore, only a very senior official ought to make what is an essentially political judgment—whether imports are at prices not "fair" and are causing injury to an industry.

If the senior official reached that conclusion, *then* the mechanical rules for calculating actual margins and duties, calculated from the difference between the extensively defined "purchase price" and "foreign market value," would be applied.[118] But the critical, up-front decisions, particularly whether appraisement should be withheld, were not meant to be mere mathematical calculations, left to lower-ranking officials.

Shifting Adjudication to the Courts

An alternative approach which accommodates these competing notions is to shift adjudications to the courts. The first governmental approach to dumping, the Antidumping Act of 1916,[119] provided criminal and treble damage remedies, enforceable in the courts, for dumping with the predatory intent of injuring a domestic industry.[120] The burden of proof under this law was soon

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[116] Van Bael, *supra* note 111, at 536. In the mid-1970s, the Commission had only five professionals dealing with antidumping investigations. *Id.* at 536 n.75.

[117] Antidumping Act, 1921, ch.14, § 201(a), 42 Stat. 11 (codified at 19 U.S.C. § 160(a) (1976).

[118] *See* notes 16–17 *supra* and accompanying text.

[119] 15 U.S.C. §§ 71–7u (1976).

[120] *Id.* § 72.

seen to be so high that the administrative application of antidumping duties was adopted by the 1921 Act.[121] Since then, the 1916 law has been a virtual dead letter, and has never successfully been invoked.[122] Domestic interests consider the 1916 Act undesirable not only because the burden of proof is high, but also because service on offending exporters cannot always be assured and information in foreign countries cannot be obtained as easily as it can be made available to government (U.S. Customs) investigators.[123] Moreover, initiation of such proceedings threatens the complaintants with antitrust counterclaims that are burdensome to defend and may result in liability. In fact, in the few currently pending 1916 Act cases, antitrust counterclaims have been common.[124]

Nevertheless, it is appropriate to ask whether at least some antidumping problems should not be shifted, through proceedings simpler than those under the 1916 Act, to the traditional arbiters of private disputes: the courts. "Dumping" is a problem for private businesses primarily created by the decisions of foreign businessmen (even government-owned or -controlled firms, but, in this context, not acting in their sovereign capacities under our notions of sovereign immunity).[125] Their disputes ought to be resolved *inter se*. Moreover, the imposition of antidumping duties does not *compensate* the domestic industry for any injury it may have suffered. Damages might be obtained in court, as well as injunctive relief barring future dumping. Such a system would also serve to keep governments out of disputes they might want to avoid. Of course, when important sectors of the economy (*e.g.*, steel, autos, textiles) are the subject of massive persistent below-cost sales, government participation and governmentally-imposed antidumping measures (such as the "trigger price mechanism") may still be appropriate.

But we should ask why the government must be involved in the relatively insignificant cases that make up most of the caseload.

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[121] *See Antidumping Code Analysis, supra* note 19, at notes 7–13 and accompanying text.

[122] Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT'L LAWYER 227, 232 (1977). The Act has been cited in reported cases only seven times. *Id.* at 230 n.37. *But see id.* at 232–34.

[123] *Cf.* Tariff Act of 1930, *supra* note 1, § 776(a) (to be codified at 19 U.S.C. § 1677e(a)) (requiring verification by the Administrative Authority) and the implementing regulations, Antidumping Regulations, *supra* note 18, § 353.31; Countervailing Duties, 45 Fed. Reg. 4932, 4947 (1980) (to be codified in 19 C.F.R. 355.39(c)). The new Countervailing Duty regulations were adopted recently by the Commerce Department. *Id.* (to be codified at 19 C.F.R. part 355) [hereinafter cited as Countervailing Duty Regulations].

[124] *See* note 60 *supra*, and accompanying text.

[125] *See* 28 U.S.C. §§ 1603(d), (e), 1605(a)(2) (1976).

With expanded notions of service of process, class action and other rules, private suits in the Customs Court (or some other forum) may be a more suitable solution for achieving the aims of the domestic industry at substantially less cost to the government. The private plaintiffs could invest as many resources as they deem warranted by the relief sought and a court with equitable powers could, presumably, fashion time periods, methods of proof and interim relief in a better way for all concerned. For those relatively few cases that are so important to the economy that government action is considered useful, resort to government antidumping proceedings should still be available. *Domestic* unfair competition laws are structured in this way, with a mix of private and "public" enforcement,[126] although private actions are preferred. The public prosecution of cases is left to executive discretion in important matters. It is a rule that U.S. practices with respect to international competition would do well to emulate.

Small businesses may object to the cost and other problems they face in prosecuting cases against large foreign or multinational companies. This problem is by no means unique to antidumping cases, however; small companies have comparable disadvantages in dealing with large domestic adversaries. The essential point is that both antidumping and countervailing duties were not intended by Congress to be for the benefit of individual firms; they are only to be sought and available "on behalf of an industry."[127] Therefore, current principles of class action litigation should be adequate to permit meritorious prosecutions in an appropriate judicial forum for proper relief on behalf of even small firms.

Congress Chose Quasi-Adjudication

The Trade Agreements Act of 1979 reflects the choice to continue the system as it existed under the prior laws.[128] Both the Senate Finance Committee and House Ways and Means Committee

[126] *See* sections 4, 4C and 4F of the Clayton Act, 15 U.S.C. §§ 15, 15c, 15f (1976).

[127] Tariff Act of 1930, *supra* note 1, sec. 732(b)(1) (to be codified at 19 U.S.C. § 1673a(b)(1)). *See* note 64 *supra* and accompanying text.

[128] Sen. Mathias, however, has introduced a bill to be titled the "Unfair Foreign Competition Act," which would amend the Antidumping Act of 1916 by replacing the intent to injure language with the less strict standard of knowledge of selling below cost. *See* S.938, 96th Cong., 1st Sess. 125 CONG. REC. S.4307 (daily ed. April 10, 1979). Hearings on the bill were conducted on Dec. 6, 1979 before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Judiciary Committee. The hearings are not yet published.

Reports on the Trade Agreements Act make claims that proceedings under the Trade Agreements Act are "investigations,"[129] but they will more than ever bear the trappings of quasi-adjudications. It is, of course, a well-known characteristic of U.S. society to adopt vague rules for economic and social behavior and to "leave it to the judge" to spell them out and enforce them. In this respect, the world's oldest democracy trusts its judges more than its elected legislators or executives. The result has been an ever-widening responsibility placed on courts as well as administrative agencies asked to behave like courts.

Antidumping and countervailing duty proceedings under the Trade Agreements Act will now bear numerous hallmarks of traditional litigation:

(1) An official "record" must now be kept.[130] Heretofore, there has been no single official record that included all materials relevant to an individual case. Correspondence and other communications addressed to the Secretary or other officials were generally kept by the addressee, as was the latter's reply. The Customs Service's files contained not only submissions by interested parties that found their way to that depository but also scratch pad notes of case handlers and logs of telephone calls that occasionally were memorialized. Thus, no one was able to acquire a comprehensive view of the *entire* record. The Commerce regulations now require the creation of a central record.[131] This procedure will be essential to permit the type of judicial review "on the record" contemplated by the new section 516A of the Tariff Act[132] and is clearly a step aimed at eliminating "extrinsic" considerations from decisionmaking.

(2) The extensive opportunities for judicial review of all interlocutory and final decisions[133] will make the administering authority behave more like a judge and less like a policymaker. If his

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[129] *See, e.g.*, H.R. REP. No. 317, *supra* note 2, at 50, 59; S. REP. No. 249, *supra* note 32, at 100.

[130] Judicial Review Provisions, *supra* note 99, §§ 516A(a)(2), (b)(2) (to be codified at 19 U.S.C. § 1516a(a)(2), (b)(2)).

[131] Countervailing Duty Regulations, *supra* note 123, § 355.15(a); Antidumping Regulations, *supra* note 18, § 353.25(a).

[132] Judicial Review Provisions, *supra* note 99, §§ 516A(a)(1), (2) (to be codified at 19 U.S.C. § 1516a(a)(1), (2).

[133] Judicial Review Provisions, *supra* note 99, § 516A(a)(1), (2) (to be codified at 19 U.S.C § 1516a(a)(1), (2).

opinions are regularly to be reviewed by judges, he will write to his new critical audience. To the extent that the Customs Court attempts to exercise significant reviewing powers and affected parties find the forum hospitable to their claims, the processes of the administering agency will even more resemble pretrial conferences with the final resolution of cases coming from a real courtroom.

(3) Section 777(a)(3) now requires the administering authority and Commission to maintain a record of all "*ex parte*" meetings between interested parties and those persons within the relevant agency charged with recommending or making a determination.[134] This "reform" was regarded as essential to avoid the perceived willingness of decisionmakers to consider matters outside the four corners of an official record in making their decisions.[135] This section also tends to transform Assistant Secretaries into judges, insulated from nonrecord contacts.[136]

(4) Extensive provisions grant parties access to the information collected,[137] with even confidential business data potentially made available through the device of protective orders.[138] These provisions will, in practical terms, be a significant element in introducing lawyers into the proceedings. In general, only lawyers will be sufficiently independent of the parties themselves to qualify for the disclosure of confidential information,[139] and the introduction of lawyers for this purpose will, quite naturally, contribute to the conversion of the investigations into litigation-like proceedings.

(5) Hearings must be held on request before all final determinations,[140] annual redeterminations[141] and revisions of orders.[142] Although this is a continuation in part of prior practice,[143] further

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[134] Tariff Act of 1930, *supra* note 1, § 777(a)(3) (to be codified at 19 U.S.C. § 1677f(a)(3)).

[135] *See* SEN. REP. No. 249, *supra* note 32, at 100; H.R. REP. No. 317, *supra* note 2, at 77.

[136] *See* the implementing regulations spelling out the rules for creating records of such *ex parte* contacts. Countervailing Duty Regulations, *supra* note 122, § 355.16; Antidumping Regulations, *supra* note 18, § 353.26.

[137] *See* Tariff Act of 1930, *supra* note 1, § 777 (to be codified at 19 U.S.C. § 1677f).

[138] *Id.* § 777(b), (c) (to be codified at 19 U.S.C. § 1677f(b), (c)).

[139] "Generally, disclosure under a protective order will be made only to attorneys who are subject to disbarment from practice in the event of a violation of the order." Countervailing Duty Regulations, *supra* note 123, § 355.20(a)(3); Antidumping Regulations, *supra* note 18, § 353.30(a)(3).

[140] Tariff Act of 1930, *supra* note 1, § 774(a) (to be codified at 19 U.S.C. § 1677c(a)).

[141] *Id.* § 751(a), (d) (to be codified at 19 U.S.C. § 1675(a), (d)).

[142] *Id.* § 751(c), (d) (to be codified at 19 U.S.C. § 1675(c), (d)).

[143] *See* TRADE AGREEMENTS ACT OF 1979: STATEMENTS OF ADMINISTRATIVE ACTION, H.R. Doc. No. 153, 96th Cong., 1st Sess., pt. 2, at 406, 424, 429 (1979).

elaboration of the principles brings a more adjudicative cast to the proceedings.

(6) The Administering Authority is repeatedly admonished to articulate the reasons behind his determinations.[144] Requiring publication of statements of reasons for judgments is one of the key elements of transparency found in the two Codes[145] that has been carried over into U.S. law, and is a hallmark of decisionmaking in litigation. In that connection, the recent decision of a private publishing firm, the Bureau of National Affairs, Inc., to publish and index the decisions of the Administering Authority and the Commission[146] should enable interested persons and the bar to deal with the law through methods familiar to lawyers involved in litigation-type proceedings.

Summing Up

The Trade Agreements Act has undoubtedly made some desirable improvments in the antidumping and countervailing duty laws. The adjudicatory cast given to proceedings and the extensive administrative detail that has been included both in the statute and, to an even greater extent, in the regulations adopted—and still to be supplemented—tend to assure transparency and certainty.

On the other hand, these same characteristics tend to reduce, if not wholly prevent, the opportunity the law should give decisionmakers to consider other facts that are of possible concern and of no less importance to the priorities of the United States. They overlook political relations with affected foreign governments. Both with regard to the timing and the substance of decisions, the fact that a foreign government is facing an election campaign, the outcome of which may be influenced by U.S. decisions on trade; or that leases for U.S. military bases on its soil are under negotiation; or that a significant purchase of U.S. exports is under consideration by its postal service are all wholly disregarded for the benefit

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[144] *See* Tariff Act, *supra* note 1, §§ 705(d), 735(d) (to be codified at 19 U.S.C. §§ 1671d(d), 1673d(d)). Both of these sections dealing with countervailing duties and antidumping require the Administering Authority to publish notice of its determination in the Federal Register and state the "facts and conclusions of law upon which the determination is based").

[145] *See, e.g.*, Subsidies and Countervailing Measures Agreement, *supra* note 26 pt. I, art. 2, para. 15, *reprinted in* MTA at 265; Antidumping Agreement, *supra* note 58, pt. I, art. 8, para. 5, *reprinted in* MTA at 322.

[146] The service will commence with [1980] Int'l Trade Rep. Dec. (BNA) 5001.

61-219 O - 80 - 6

of the particular U.S. producers who happened to have invoked the law. No scope is provided for considering the consistency of the foreign government's behavior with programs of the U.S. government or U.S. producers. The fact that the United States, too, provides preferential export credits through the Export-Import Bank and has regional aid and research and development grants available to eligible companies that may export their output are irrelevant.

More fundamentally, although a series of laws had been enacted to aid the lesser-developed countries, in particular by extending the Generalized System of Preferences to their exports, development goals are extraneous to antidumping and countervailing duty decisions. At at time when the control of inflation is repeatedly cited as the number one priority aim of government programs, the inflationary impact of antidumping and countervailing duty determinations is considered legally irrelevant.[147] At a time when the U.S. economy is threatened by low productivity and lethargic adjustment, these statutes stand in the way of expeditious encouragement to the adjustment process. They may stifle, rather than spur, innovation and efforts to meet competition in the market.

On the procedural side, the acceleration of decisionmaking mandated by the law will prevent a thorough examination of sensitive issues, many of which take more time than is allowed even with significant additions of personnel and an administration determined to meet all time limits. Judicial review by the Customs Court will be in a forum that traditionally has had a rather narrow perspective of the issues, and may treat countervailing duty cases in particular with a technocratic approach that is insufficiently alert to the impact its decisions may have on the international relations of the United States. To extend to the courts this ability to "interfere" with foreign relations is a peculiar American penchant. And however much Congress wishes to regard a countervailing duty case as a mere adjudicatory dispute, foreign governments may not be willing so to characterize it.

The adoption of more adjudicatory procedures and the availability of expanded judicial review create an impression of certainty in U.S. processes and that willful behavior by foreigners can be

[147] *See, e.g.*, Complaint, Southwest Florida Winter Vegetable Growers Ass'n v. Miller, Civ. No. 79-2974 (D.D.C., filed Nov. 1, 1979), alleging improper consideration of the inflationary result of a tenative affirmative antidumping petition. *Id.* para. 35.

checked by the "simple" adoption of rules. To that extent, the new law tends to detract from more meaningful approaches that should be adopted to maintain the vitality of the U.S. economy. Effort might better go to developing positive domestic aids to help keep U.S. industries modern amd efficient, and to retrain and relocate U.S. workers to areas in which they can demonstrate their comparative advantage.

To the extent that a significant additional allocation of the taxpayers' resources is spent on making these laws work, one must question whether the new procedures are consistent with the goal to streamline the bureaucracy and reduce the federal budget. If it is indeed correct that most of the disputes that become the subjects of antidumping and countervailing duty cases are peripheral to the mainstream of U.S. foreign economic policy, a trebling of the agency's antidumping and countervailing duty budget and the hiring of hundreds of new investigators and case handlers[148] may not make good sense. On the other hand, compared to the total resources of the nation and of any of its constituent budget agencies, the amount allocated to this function remains a relative pittance. Whether perceived as excessive or deficient, however, to the extent this expenditure restrains unfair competition, it may be money well spent. It is simply hard to prove that the regime has in the past had any such effect.

Finally, the new procedures have taken an important step toward facilitating "settlements" of trade disputes through the suspension of procedures.[149] However, they have with the left hand taken away virtually all that the right hand has granted. The new settlement procedures seem so excessively circumscribed that their utility must be considered severely compromised.

The President's reorganization plan,[150] shifting responsibility for the day-to-day administration of the rules to the Commerce Department, while establishing the United States Trade Representative (STR) as coordinator of overall trade policy, may be a significant and useful reform. There is no question but that the Treasury Department treated antidumping and countervailing duty matters as a stepchild. Prior to the Carter Administration, these functions were secreted in the Enforcement Secretariat of

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[148] *See* notes 108-110 *supra* and accompanying text.
[149] *See* notes 96–97 *supra* and accompanying text.
[150] 44 Fed. Reg. 69273 (1979).

Treasury, without an Assistant Secretary devoting to it the full-time consideration it deserved, and without a Customs Sevice motivated to treat the laws as other than just one more of the normal regulations with which the Service must cope on behalf of Treasury and other agencies. Antidumping and countervailing duty proceedings were surely not seen as the significant element of trade policy that they are in fact.

In the Carter Administration, the responsibility for these statutes was finally removed from the Enforcement Secretariat but was placed, oddly, under the jurisdiction of the General Counsel[151]—the sole line responsibility of a staff officer whose traditional responsibilities are limited to the critical duty of providing impartial legal advice on all matters before the agency (including, while it was lodged at Treasury, antidumping and countervailing duty law administration). Under these circumstances, it was perhaps appropriate to shift the administration of the laws to a Department for which trade should be a higher priority and in which administration of these statutes would be one of only two responsibilities of an Assistant Secretary. The increase in manpower and budget will also underscore the importance that the government as a whole now places on the program; and in a new home that emphasis perhaps will be heard more loudly.

The extent to which the U.S. Trade Representative can, in fact, coordinate "policy" in antidumping and countervailing duty areas remains to be seen. It may be that new methods of operation will evolve between the persons holding the responsible positions in each agency.[152] With good will and mutual respect and candor, such a system can work. On the other hand, the time periods for decisionmaking under the new law are so short, the factual record in most cases is so complex, and the mere passage of time required to move bureaucratic papers from one building to another so long, that it must be doubtful that the STR will be able to involve himself in more than a handful of antidumping and countervailing duty cases pending before the Department of Commerce.

He will nonetheless become the subject of much more intense

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[151] Treas. Order No. 250-1 (June 16, 1977); *see also* Treas. Order No. 250-2 (Rev. 1), 42 Fed. Reg. 54042 (1977).

[152] The fact that the first Deputy Assistant Secretary of Commerce for Import Administration, John D. Greenwald, was Deputy General Counsel of the Office of the Special Trade Representative may help facilitate cooperative methods of operation.

lobbying efforts by foreign embassies who will regard this opportunity for conveying their "political" views into the controversy as well-nigh obligatory. On the other hand, Commerce will, as a natural bureaucratic response, seek to retain final decisionmaking responsibility and resist "guidance" from whatever source, however diplomatically phrased.

There are some experienced trade practitioners in Washington who are already portraying the new Trade Agreements Act as an unmitigated disaster. They are convinced that the Commerce Department will be unable to apply the law with good sense, or to remain resistant to constituency pressures both in Congress and more broadly throughout the land. There are others who see the Act as the culmination of extended efforts to make something of what they regarded as a forgotten item of legislation left in the hands of disinterested administrators. There are still others, involved with the negotiation of the international MTN Codes, who, after the many months of exhausting effort, have come to regard any agreement as an achievement and the implementing legislation as its capstone. They may not recognize its profound deficiencies. Perhaps, however, they are the only realists in town. Obtaining any agreement in a world pushing toward protectionism and recrimination is no small achievement.

In October 1979, the Royal Commission on Legal Sevices in England observed that "[a] society in which all human and social problems were regarded as apt for a legal remedy or susceptible to legal procedures would not be one in which we would find it agreeable to live."[153] It is a caution that the draftsmen of the Trade Agreements Act of 1979 might well have heeded. For they have made of a matter of trade policy a legal program questionably suited to the task. But it *is* questionable. No prudent person dares state what the Trade Agreements Act *will* mean. It *could* have meant and still *may* mean that we have devised a procedure that realistically deals with real problems. Alas, it may be no less true that we have erected a stately court upon the beach that is no more effective against the tides of change than was the seat of King Canute.

[153] Goldstein, *Lawyers Debate a Public 'Tithe,'* N.Y. Times, Oct. 21, 1979, § 4, at 8, col. 4.

Table 1--Antidumping Cases Initiated between January 1975 and August 1979, by ISIC Codes

ISIC Number	ISIC Sector Description	Cases Pending As of 9-17-79		Cases Initiated January 1975 to August 1979					
				Affirmative Cases In Effect on 9-17-79		Terminated or Negative Cases		Total Cases	
		Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars
1	Food and Kindred Products	2	290	3	10	2	6	7	306
2	Textiles and Apparel	3	5	5	9	5	38	13	52
3	Lumber and Wood Products	1	11	1	8	1	2	3	21
4	Paper and Products	0	0	0	0	3	88	3	88
5	Industrial Chemicals and Fertilizers	12	83	4	18	2	51	18	152
6	Drugs, Soaps, Cleaners and Toilet Preparations	0	0	0	0	0	0	0	0
7	Paints, Gum and Wood Chemicals, and Miscellaneous Chemical Products	0	0	4	4	4	16	8	20
8	Rubber and Plastics Materials	0	0	5	60	6	25 1/	11	85 1/
9	Leather and Products	0	0	0	0	0	0	0	0
10	Stone, Clay, and Glass Products	0	0	0	0	3	48	3	48
11	Ferrous Metals and Products	2	41	3	212	31	2,220	36	2,473
12	Nonferrous Metals and Products	0	0	0	0	1	1	1	1
13	Hand Tools, Cutlery, and Tableware	0	0	0	0	0	0	0	0
14	Other Fabricated Metal Products	0	0	0	0	0	0	0	0
15	Construction, Mining, Agricultural, and Oil Field Machinery and Equipment	0	0	1	2	0	0	1	2
16	Office and Computing Equipment	1	40	0	0	0	0	1	40
17	Machine Tools--Other Metalworking Equipment and Other Nonelectrical Machinery	0	0	1	20	2	3	3	23
18	Electrical Machinery, Power Boilers, Nuclear Reactors, and Engines and Turbines	0	0	0	0	4	92 2/	4	92 2/
19	Consumer Electronic Products and Household Appliances	1	159	0	0	1	3/	2	159
20	Scientific and Controlling Instruments	1	5	0	0	0	0	1	5
21	Photographic Equipment and Supplies	0	0	0	0	0	0	0	0
22	Communication Equipment and Non-Consumer Electronic Equipment	0	0	0	0	0	0	0	0
23	Railroad Equipment and Miscellaneous Transportation Equipment	0	0	1	2	2	486	3	488
24	Aerospace Equipment	0	0	0	0	0	0	0	0
25	Automotive Equipment	0	0	0	0	8	7,604	8	7,604
26	Misc. Manufacturers, etc.	0	0	1	6	3	14	4	20
4/	Items Not Classified Above	0	0	0	0	3	46	3	46
	TOTAL	23	634	29	361	81	10,752 3/	133	11,752

4/ In year prior initiation of

Footnotes:

1/ Excludes import values for polymethyl methacrylate polymers from Japan and butadiene acrylonitrile rubber from Japan.

2/ Excludes rechargeable sealed nickel-cadmium batteries from Japan.

3/ Less than $500,000.

4/ Comprises items of unknown classification.

5/ Excludes imports of items mentioned in Footnotes 1-3.

Source: Compiled by the Office of Economic Analysis, U.S. Customs Service, from the Trade Action Monitoring System of the Office of the Special Representative for Trade Negotiations.

Table 2--Countervailing Duty Cases Initiated between January 1975 and August 1979, by ISAC Codes

ISAC Number	ISAC Sector Description	Cases Pending As of 9-17-79		Cases Initiated January 1975 to August 1979					
				Affirmative Cases In Effect on 9-17-79		Terminated or Negative Cases		Total Cases	
		Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars	Number of Cases	Value of Imports Million Dollars
1	Food and Kindred Products	2	6[1]	16	473	3	8[2]	21	487[1/2]
2	Textiles and Apparel	2	48	11	624[3]	15	1,747[4]	28	2,419[2/5]
3	Lumber and Wood Products	0	0	0	0	0	0	0	0
4	Paper and Products	0	0	0	0	0	0	0	0
5	Industrial Chemicals and Fertilizer	0	0	0	0	0	0	0	0
6	Drugs, Soaps, Cleaners and Toilet Preparations	0	0	3	2	1	2	1	2
7	Paints, Gum and Wood Chemicals, and Miscellaneous Chemical Products	0	0	0	0	0	0	3	2
8	Rubber and Plastics Materials	0	0	0	0	1	1	1	1
9	Leather and Products	1	9	1	8	1	14	2	22
10	Stone, Clay, and Glass Products	0	0	6	79	4	77	11	165
11	Ferrous Metals and Products	5	71	2	1	5	8	7	9
12	Nonferrous Metals and Products	0	0	3	316	11	2,338	19	2,725
13	Hand Tools, Cutlery, and Tableware	0	0	1	19	0	0	1	19
14	Other Fabricated Metal Products	0	0	0	0	0	0	0	0
15	Construction, Mining, Agricultural, and Oil Field Machinery and Equipment	0	0	4	140	0	0	4	140
16	Office and Computing Equipment	0	0	0	0	0	0	0	0
17	Machine Tools--Other Metalworking Equipment and Other Nonelectrical Machinery	0	0	0	0	0	0	0	0
18	Electrical Machinery, Power Boilers, Nuclear Reactors, and Engines and Turbines	0	0	0	0	0	0	0	0
19	Consumer Electronic Products and Household Appliances	0	0	0	0	1	5/	1	5/
20	Scientific and Controlling Instruments	2	64	0	0	1	17	3	81
21	Photographic Equipment and Supplies	1	4	1	1	0	0	2	5
22	Communication Equipment and Non-Consumer Electronic Equipment	0	0	0	0	0	0	0	0
23	Railroad Equipment and Miscellaneous Transportation Equipment	0	0	0	0	0	0	0	0
24	Aerospace Equipment	0	0	0	0	1	11	1	11
25	Automotive Equipment	0	0	0	0	0	0	0	0
26	Misc. Manufacturers, etc.	0	0	0	0	0	0	0	0
	TOTAL	1	6/	1	1	1	1,495	3	1,496[6/]
		14	202[1/6/]	49	1,664[3/]	45	5,716[2/4/5/]	108	7,584[2/]

* in your presentation of proceedings

Footnotes:

1/ Excludes frozen potato products from Canada.

2/ Excludes processed asparagus from Mexico and dried apples from Italy.

3/ Excludes men's and boys' apparel from Colombia, Pakistan, and Uruguay.

4/ Excludes certain apparel and textiles from five countries, and shoes from West Germany.

5/ Excludes oxygen sensing probes from Canada.

6/ Excludes rifles, shotguns, combinations, and parts from Brazil.

7/ Excludes imports of items cited in footnotes 1-6.

Source: Compiled by the Office of Economic Analysis, U.S. Customs Service, from the Trade Action Monitoring System of the Office of the Special Representative for Trade Negotiations.

Mr. EHRENHAFT. One of the great problems we had while I was in the Treasury and one which the hearings before this committee illustrated was the lack of facts that we all have about the real effect of these laws.

You will recall, I was asked to provide you with data concerning the antidumping duties that were collected by the Treasury over the last few years. I was unable to provide those facts to you at that time and it was with substantial effort that we finally got ourselves in the position where we were collecting that kind of data.

The General Accounting Office was asked to study the administration of the Antidumping Act and it, for the first time, began to collect information about the trade effects of actual antidumping proceedings. They investigated: Is it true that once an antidumping proceeding begins, the trade is chilled? or is it true, on the contrary, that once an antidumping proceeding begins enormous quantities of goods rush into the United States awaiting a withholding of appraisement?

Or is it true that, as others contend, nothing occurs when an antidumping proceeding is initiated and, in fact, these proceedings are largely irrelevant to trade flows? As you gentlemen know, the General Accounting Office study that was submitted last March shows that you cannot generalize at all; that each of these statements is true in some cases and each is true in others.

The one experience that I did come away with was that when we have serious trade problems, problems of adjusting our economy to new developments in the world, whether it be with respect to color television sets, automobiles, steel, the existing kind of microeconomic approach of the antidumping law is not a suitable vehicle for achieving the goal we want to reach.

The emphasis on each individual shipment, of making many, small, detailed adjustments and so on, overlooks this serious problem that we ought to be getting at. I think it can be said, therefore, the Antidumping Act does not serve our overall trade policy.

I think this committee should be studying what kinds of larger types of arrangements can better serve that purpose than the Antidumping Act.

On the other hand, for the very small case, coathangers from Canada, motorcycle repair manuals from the United Kingdom, manhole covers from India, or products of that type, I think that you gentlemen should ask:

> Is it really necessary, desirable, appropriate, that we create a government department that has to investigate these matters and which confronts foreign governments in the prosecution of these cases?

I think the notion behind the 1916 act and Senator Danforth's bill is very desirable because I think that it would shift to a private forum what is essentially a private dispute about access to the marketplace between the foreign supplier and the domestic industry with which it is competing.

I think that what we ought to be looking for is the correct forum for these kinds of disputes. Is it the district court? Is it the customs court that would be familiar with antidumping language under the existing statute?

What about the problems of counterclaims? Should we permit counterclaims in these kinds of cases, or not?

I think that one of the reasons that the 1916 act has not been utilized in the past has been because of the fear that domestic producers invoking that law will be subject to counterclaims by the domestic producers—excuse me, by the foreign suppliers—under the antitrust laws.

Those, in essence, are the basic observations that I wanted to share with you.

Senator RIBICOFF. Are there any questions?

Senator Danforth?

Senator DANFORTH. No questions.

Senator RIBICOFF. Are there any questions?

Senator Chafee?

Senator CHAFEE. I was not sure of your last point; the fear that the domestic producer would be subject to a counterclaim by the exporter or the importer in the United States. How would such a counterclaim be made?

Mr. EHRENHAFT. The counterclaim would derive out of charges that the mere bringing of the antidumping proceeding or other behavior by the domestics constituted an antitrust violation. You asked Mr. Verrill earlier about the *Polish golf cart* case and that is a perfect example of that situation. A 1916 Antidumping Act proceeding was brought by the domestic producers against the exporters of Polish golf carts.

The reason that the 1916 act claim was dismissed by the court was because the court found that Polish golf carts are not sold in Poland. Therefore, there was no discrimination between markets as is required under the express language of the 1916 act, and the 1916 act did not apply to the Polish golf cart situation where the carts were sold only in the United States. But at the same time, the Polish golf cart producers filed an antitrust claim against the domestic producers and that antitrust counterclaim has now been sustained, in part, by the court.

The claim made—and it is totally unproven—but the claim made was that the American producers used the antidumping proceedings to submit false information to the Government in an effort to drive out the Polish producers.

This vulnerability to possible antitrust discovery and antitrust liability is, I think, in the minds of private practitioners, a principal reason why private antidumping actions are not filed.

Senator CHAFEE. Thank you.

Senator RIBICOFF. Thank you very much.

Mr. Cunningham?

STATEMENT OF RICHARD O. CUNNINGHAM, ESQ., STEPTOE & JOHNSON, ON BEHALF OF AMF, INC.

Mr. CUNNINGHAM. Mr. Chairman and members of the committee, my name is Richard Cunningham. I am a member of the law firm of Steptoe & Johnson, appearing today as counsel for AMF, Inc.

With me is Mr. James Hackney of my firm. We have submitted a written statement that I would ask be placed in the record.

AMF's prepared testimony deals with two of the most frustrating experiences in my career in international trade law. Both were cases where AMF came to me and presented a case of clear dumping, absolutely clear, with large dumping margins and equally clear injury to the affected U.S. industry. Yet, in neither case did the antidumping laws provide a viable remedy.

One was the case of a sudden and massive influx of imports, in this particular case, imports of Mopeds in 1978.

The 1921 Antidumping Act simply could not be used in that situation, even if a 90-day retroactivity provision had been applied—and, I might add, to my knowledge that 90-day retroactivity provision has never been applied for retroactive assessment of duties.

It took 2 or 3 months for statistics showing this massive influx of imports to be published, so that AMF could become aware of the problem, then it would have taken another 6 months or more to prepare and file a case, particularly now when the requirements for filing a case are very explicit, very detailed, and your case can be thrown out at the outset if you do not have all your data ready at the start.

Even if duties reached back 90 days prior to the filing of the case, those duties would not have reached the imports which were already in the country, already in importers' warehouses and dealers' showrooms.

The second example in our mind is an even more troublesome one. It involves what I call inventory dumping. It is a loophole in the present law which I fear can be used, and will be used, with increasing frequency by foreign companies to evade the Antidumping Act of 1921 and now the Trade Agreements Act of 1979.

Many foreign companies now have their own U.S. subsidiaries which inventory the imported merchandise and later resell it. This is particularly true in the consumer goods area. Under the dumping laws, dumping cannot occur in that situation until the subsidiary takes the merchandise which previously has been imported out of inventory and resells it in the U.S. market to an independent purchaser.

This opens up the possibility that the foreign seller could first ship to the United States a quantity of goods sufficient to accomplish its commercial goal, to gain its desired share of the U.S. market, work off excess inventory, use up excess capacity, or whatever.

And second, those imports could be held in inventory long enough so that no dumping duties could be imposed, even under 90-day retroactivity, and then sell those out of inventory at whatever price the foreign company wanted, no matter how low, and do so with impunity.

That is what had happened with Japanese motorcycle imports in the mid-1970's. We tried to deal with that problem by bringing a dumping case. We proved substantial dumping but we got no relief and I personally believe that it was because the ITC looked at the case and concluded, quite reasonably, that it was too late for dumping duties to solve the problem.

The merchandise was already in the country. Prospective dumping duties would apply to new merchandise coming in, but these

big inventories that had already been built up were the ones that were being dumped.

In both of these cases, then, there was a serious dumping problem but there was no remedy for AMF.

An effective 1916 act would have provided a remedy of the type that we really needed. A retrospective remedy, a remedy in damages.

AMF therefore strongly supports the effort to revitalize this law and in our proposed statement, make some specific suggestions.

I wonder if I might, before the committee begins questions, address the two questions which I think are quite important that Mr. Bradley has proposed.

Senator RIBICOFF. Mr. Bradley is in the other room. I will wait until he comes back.

Will you tell Mr. Bradley that one of the witnesses would like to address his questions?

I am just curious—were you on the other side of that Polish golf cart case?

Mr. CUNNINGHAM. No.

Senator RIBICOFF. You know the result of it, as the witness has testified. What damages did the Polish Government get from AMF?

Mr. CUNNINGHAM. I do not think there have been any damages awarded.

Senator RIBICOFF. They said they had won the case.

Mr. CUNNINGHAM. There were two cases.

Senator RIBICOFF. Then they brought a counterclaim, you said?

Mr. CUNNINGHAM. Well, first there was an administrative case, a 1921 Antidumping Act case. That was a case that was prosecuted and won.

There have been some severe difficulties in calculating the dumping duties to be imposed in that case. There have been long delays, much as has been the case with imposing dumping duties on television sets.

AMF subsequently brought another case, the 1916 act and Sherman Act case in court, and that is the case in which the counterclaim has been filed.

In that case, the court case, my understanding is that neither the affirmative claims by AMF nor the counterclaim by the importer have been resolved as yet.

Senator RIBICOFF. I see. The case is still pending?

Mr. CUNNINGHAM. Yes.

Senator RIBICOFF. Senator Bradley, the witness would like to respond to some of the questions that you asked. Would you go ahead?

Mr. CUNNINGHAM. I think, Senator, you pose two very important questions here. The first and perhaps most important is would this bill have been an inflationary impact?

Heaven knows, everyone in this room ought to be concerned with the inflation problem. I think it would be a noninflationary bill, indeed, a counterinflationary bill, and let me tell you why.

I think we realize more and more these days that we have to attack inflation over the longrun by revitalizing, modernizing, expanding U.S. industry and improving its productivity. That is, now

we are more and more aware of the supply side to this problem as well as the demand side to the inflation problem.

I can tell you, Senator, that there is nothing that will chill investment, modernization and improving productivity by U.S. industry more than to have that industry faced with a problem of serious dumping where it can make the investments, become more efficient, and yet still lose its market to discriminatorily priced imports from abroad.

If U.S. industry does not have rules that it can play by in this economic game, rules that insure that if it becomes efficient and productive, it will succeed and make profits, then it is not going to engage in the investment and modernization that we have to have to take care of inflation here.

AMF's experience in the two cases that I sited in my testimony are perfect examples of that. Dumping has forced AMF out of the lightweight motorcycle market which it was once in. It has forced AMF to abandon plans to go into the middleweight motorcycle market which it was well on the way to entering.

It has forced AMF to defer for at least 3 years plans to build a worldscale Moped, a Moped capable of doing 30 miles an hour, which is now the speed limit in many States.

If AMF were in those markets, we would have more competition in those markets, we would have lower prices, I think. AMF has not been able to get into those markets.

Let me also, just for a moment, address the second question that you posed—is dumping more a Sherman Act type problem or a Robinson-Patman problem? I wanted to address that because there has been a lot of misinformation today about what Robinson-Patman is really about.

I came into the dumping law from former practice in the Robinson-Patman area. I still do some Robinson-Patman work. Sometimes I think I left the real world and went into the land of Oz when I came into the dumping area from Robinson-Patman.

Robinson-Patman and the Antidumping Act are very much on foursquares except for some burden of proof questions that Senator Danforth alluded to.

There are two types of Robinson-Patman case. One has very little resemblance to a dumping case. It is called a secondary line Robinson-Patman case. It has to do with a purchaser from company A suing company A and saying you are charging a lower price to another purchaser than you are charging to me and therefore, I cannot compete with the other purchaser. But there are also primary line Robinson-Patman cases, and indeed, the litigations I have been involved with have been primary line.

A primary line Robinson-Patman case is one in which one seller, one producer, sues another producer and says to that producer, you are charging a discriminatorily low price in one market, lower than the price you are charging in another market.

I am engaged now, and our firm is engaged, in representing a defendant in a case where the defendant is charged under the Robinson-Patman Act with selling milk in Cleveland at lower prices than it sells milk in West Virginia—both markets served out of the same milk plant.

That is very much like a dumping case in which a foreign exporter is charged with selling in the United States at a lower price than it sells in Switzerland or Japan. The proof is very much the same. You prove differential pricing, and you prove that there is an issue as to whether the differential pricing is justified by differences in costs or in competitive circumstances.

Under Robinson-Patman, the burdens of proof on the price differential issue, and on that justification issue, are different. Once the plaintiff proves the difference in price, he has established his prima facie case. It is then up to the defendant to come in and show that it was a cost-justified difference, or the lower price just met a competitive offer.

Both of those issues, cost justification and lower competitive offer situation are in the dumping area also. Moreover, the competitive offer situation figures importantly in injury determinations in dumping cases because the ITC has consistently refused to find injury where the foreign imports, although dumped, are not sold below the prices offered by U.S. firms.

Second, on the cost justification side, the only difference is that the analysis does not have a burden of proof in the Commerce Department investigation. There is simply a question of whether there is a cost justification for the differences in price. It is open for the foreign manufacturers to show such a cost justification, just as it is open for the U.S. industry.

To show it is not true. All the Robinson-Patman issues are there in a dumping case. Indeed, there is even an injury test in Robinson-Patman. It is phrased in terms——

Senator BRADLEY. Your conclusion is that dumping is similar to Robinson-Patman and not to the Sherman Act?

Mr. CUNNINGHAM. Yes, sir. The Sherman deals with different, more serious problems, problems of predatory——

Senator BRADLEY. How does the Sherman Act deal with more serious problems?

Mr. CUNNINGHAM. It has an element of predatoriness in it, a degree anticompetition activity that is not found in the Robinson-Patman Act. Congress looked at the competitive situation and said, we need something in the domestic realm less than this predatoriness in the Sherman Act, and so they set up Robinson-Patman.

We do not have that in the import laws. We do not have an import analog to Robinson-Patman now which is totally satisfactory. That is what I think this bill would do, and that is why I think we need this bill.

Senator BRADLEY. If dumping occurred on a consistent basis, not a one-time event and led to market consolidation, would you then view that it might be more similar to a Sherman Act than the Robinson-Patman?

Mr. CUNNINGHAM. Without more than that, I could not say so. I would have to have more evidence than that. That, in itself, would not indicate to me that there is a specific predatory intent.

Let me give you a situation where you could have that but have no real predatory situation.

Many industries these days are highly capital-intensive industries. It is important to keep your plant fully loaded.

One of the means of doing that in international trade, which may be done over the long term, is to maintain prices at a high level in your market and fill the plant up as much as you can there. But then fill the rest of your plant by selling abroad at much lower prices—anything above direct cost of labor and materials—so it makes a contribution to your fixed cost.

You are not trying specifically to destroy competition or obtain a monopoly but you are doing something that is darned harmful to the industry and the country where you are sending those exports.

Senator BRADLEY. Thank you.

Senator RIBICOFF. Senator Danforth?

Senator DANFORTH. I take it it is your testimony that dumping is not something which is benign, anti-inflationary and favorable to the consumer.

Mr. CUNNINGHAM. I do not think so at all.

Senator DANFORTH. Dumping, in your opinion, can cause great injury to our economy, to particular elements in the economy and cost people their jobs?

Mr. CUNNINGHAM. Yes, sir.

Senator DANFORTH. You know specific instances in your own company where that has happened?

Mr. CUNNINGHAM. Yes, sir, and the companies that I have represented.

I may add, Senator, that neither I nor my firm engages excessively in representing U.S. companies affected with dumping. We have represented foreign companies that have sold into the United States and then charged with dumping.

What I seek personally and what my clients seek is not inhibitions of trade but fair rules for trade that everybody can live by.

Senator DANFORTH. Now, is it fair to say that this bill substantially places discriminatory sales in an international sense on the same footing that Robinson-Patman puts them on if the sales are made domestically?

Mr. CUNNINGHAM. Yes; I think it does. I must say I do not agree entirely with every provision of the bill. I have some problems with the treble damage remedy. I think that thas a chilling effect on trade.

Senator DANFORTH. You are not alone in that. Maybe we will take care of that.

Mr. CUNNINGHAM. I have some problems with how the meeting competition defense would be translated from the Robinson-Patman context to a dumping context. There are proof problems but generally I think the bill is good and goes in the right direction.

Senator DANFORTH. Do you think the present state of the law is adequate to protect American industry and American jobs from dumping?

Mr. CUNNINGHAM. No, I do not. Certainly AMF does not. The two examples I just cited are clear instances of actual cases in which the U.S. industry had a serious dumping problem but no remedy under any U.S. law.

Senator DANFORTH. Do you think that this bill would be a step forward in resolving that problem?

Mr. CUNNINGHAM. Very much so.

Senator DANFORTH. Thank you.
Senator RIBICOFF. Thank you very much.
[The prepared statement of Mr. Cunningham follows:]

OUTLINE OF STATEMENT OF AMF, INC.

AMF, Inc. is an international corporation which strongly advocates the expansion of international trade. It is essential, however, that such trade be governed by rules which ensure fairness, prevent dumping, and provide effective remedies for firms and industries which may be injured by dumped imports. AMF's experience with the administrative antidumping provisions of the Trade Agreements Act (formerly the Antidumping Act of 1921) has demonstrated the inadequacy of that law's wholly prospective remedies.

I. Insufficiency of present antidumping laws

A. The Trade Agreements Act provides only prospective relief. Even under the new accelerated procedures, this relief may be worthless where dumping occurs suddenly and massively, or where the imports have already entered the country before a dumping finding is entered.

B. The 1916 Act offers a retrospective remedy in damages, but the specific intent requirement has made that act unusable.

II. Types of dumping for which there is now no remedy

A. Sudden Influx of LTFV Imports—In 1978, the U.S. moped industry was inundated within a few months by a massive volume of LTFV imports. Present laws offered no remedy.

B. "Inventory Dumping"—Where a foreign seller (usually of consumer goods) establishes its own U.S. distribution network, this may create a situation where no dumping remedy exists under present law, because the LTFV pricing does not occur until after the imports have already entered the U.S.

III. Proposed amendment of the 1916 act

A. The Act should be compensatory, not punitive.

B. The "specific intent" requirement should be deleted.

C. Single, rather than treble, damages should be awarded.

D. A plaintiff should prove LTFV pricing, "material injury" to a U.S. industry, and the plaintiff's own damages.

STATEMENT OF AMF, INC.

Good morning, Mr. Chairman. My name is Richard O. Cunningham. I am a member of the Washington law firm of Steptoe & Johnson. Today, I am appearing on behalf of AMF, Inc. an American corporation primarily involved in the production and sale of sporting goods and other leisure products, including motorcycles, mopeds, and golf cars. During the past several years, AMF has been involved in two major dumping proceedings—one involving golf cars imported from Poland and the other challenging imports of motorcycles from Japan. In addition, the company was recently confronted by a serious trade problem in the form of low-priced sales of imported mopeds, yet found that neither the dumping laws nor any other trade laws provided a viable remedy. AMF thus welcomes this opportunity to comment on the proposed revision of the Antidumping Act of 1916 and sincerely hopes that its comments will assist this committee in fashioning a fair and effective remedy for U.S. companies injured by dumping.

AMF believes that the prospective relief offered by the Trade Agreements Act of 1979 should be supplemented by an effective Antidumping Act of 1916 to enable an aggrieved U.S. manufacturer to recover damages for harm suffered from imports which enter the country before the existing remedy takes effect. Although the present 1916 Act provides for such a court suit (for treble damages), the statute has been totally ineffective, largely because a domestic complainant must show a specific intent by the foreign producer to obtain a monopoly or to destroy competition in the U.S. market. The proposed revision to the 1916 Act is a significant step toward a meaningful remedy.

Two of AMF's recent experiences with the existing U.S. laws against unfair import competition underscore the need for an effective antidumping remedy in the form of damages rather than duties.

1. MOPEDS

In the mid-1970's, it looked as if the U.S. moped market was going to enter a genuine "boom" period. the anticipation of this "boom," of course, was based on the effects of the oil embargo by the Arab nations, the subsequent gasoline price increases, and the consequent desire of many Americans to purchase transportation vehicles that were more economical and used less gas than automobiles. Mopeds are among the most economical of all vehicles. Some can get as much as 100 miles on a single gallon of gas.

AMF is a leading U.S. manufacturer of mopeds, and the company seemed to be well-positioned to participate in the expanding moped market. It was already well-entrenched in the market for low-speed mopeds—those with maximum speeds up to 20 mph, which is still the moped speed limit under the laws of some States. And it was well on its way to producing a 30 mph moped, which would enable the company to offer a full line of mopeds competitive with those of European and Japanese manufacturers.

Then came a trade problem which disrupted the U.S. market and forced AMF to defer its development program, at great cost and with serious consequences for the company's competitive position. It was a case of clear, sudden and massive dumping—yet there was no remedy whatsoever under any U.S. trade law.

By late 1977 and early 1978, it became apparent that moped manufacturers around the world had over-expanded capacity. Demand for mopeds had risen substantially, but not as rapidly as the various manufacturers had apparently anticipated. The result was a sudden and massive influx of mopeds into the country with the largest potential market and the most open market—that is, the United States. Within the space of a few months, about 500,000 mopeds were brought into the United States and inventoried for resale here. This was an enormous influx, in view of the fact that total U.S. moped sales at that time were between 25,000 and 300,000 units per year and imports prior to 1978 had been running below 200,000 units per year. In other words, two years' supply of mopeds surged into wholesalers' warehouses within a few months. These vast numbers of vehicles could only be sold by drastically cutting their prices far below home market prices and far below the prices that U.S. producers could meet on any economic basis. It was nothing short of a market disaster.

In the face of this sudden influx of imports and rapid buildup of inventories, AMF asked our firm to examine the possibility of filing a petition under the Antidumping Act of 1921. After expensive research, however, we were forced to conclude that no remedy existed under that statute. These substantial quantities of mopeds had already been imported into the U.S. and were sitting in wholesale warehouses and showrooms. For the most part, the foreign manufacturers' importer/affiliates had not begun to resell the merchandise, thus preventing the establishment by the domestic industry of evidence of less than fair value pricing. Although the domestic industry could undoubtedly have proven dumping based on the U.S. resale prices of the merchandise, the damage to AMF would have occurred long before any trade relief proceeding could run its course. Moreover, even though dumping duties can theoretically be made retroactive 90 days prior to the date of filing,[1] we still could not have prepared and filed a petition quickly enough for that 90 day retroactivity to apply to the vast majority of imports. It must be remembered that these imports were rushed into the United States in the space of a few months. By the time AMF became aware of the problem—as resales were beginning in the U.S. market—the mopeds had been in the U.S. for several months. Moreover, preparation of a dumping case requires the assembling of data on home market prices, together with a substantial body of statistical analysis on injury-related issues. It is just not possible to prepare and file a viable petition in less than two to three months.

A remedy in damages, to compensate U.S. moped producers for the damage they suffered and could not prevent through the use of any of the prospective import relief statutes, was what AMF needed in 1978. Only that type of retrospective remedy can deal with this sort of sudden influx of dumped merchandise. Moreover, the existence of such a remedy would deter such sudden, or hit-and-run dumping, because a foreign manufacturer would be on notice that he may be liable for damages if he sells at less than fair value to an extent that a U.S. industry is materially injured.

A. MOTORCYCLES

In consumer goods situations, many foreign exporters now have U.S. subsidiaries or affiliates which import the merchandise, inventory it and later resell it to

[1] It should be noted, however, that this provision of the law has never been utilized.

American purchasers. In such a distribution system, the U.S. price for dumping computation purposes—the "exporter's sale price"—is the price at which the importer/affiliate resells the merchandise. A real danger exists in this situation, therefore, that widespread dumping could occur in circumstances under which the imposition of a dumping duty on future imports would not affect the LTFV pricing of this already-imported merchandise and thus would be irrelevant to the actual dumping problem

The recent dumping investigation of motorcycles from Japan—in which AMF was the petitioner—was just such a case, and its result provides a strong indication that the 1921 Act is unable to deal effectively with this sort of price cutting. In that case, large quantities of motorcycles had been exported to the U.S. by Japanese motorcycle manufacturers between 1974 and 1977. These cycles were not dumped in the market at the time of importation—that is, they were not brought into the country at values lower than home market prices. Following a collapse of the world motorcycle market, however, huge inventories of unsold cycles began to accumulate in the warehouses of the importer/affiliates of the Japanese manufacturers. The Japanese producers chose, despite these large inventories, to keep shipping large quantities of cycles to the U.S. and to cut U.S. resale prices dramatically on these cycles in order to sell off the inventories sitting in showrooms and warehouses. As the Treasury Department found in its investigation, this price-cutting produced huge LTFV margins on a volume of sales equal to some 15 percent of the U.S. motorcycle market.

Yet despite this favorable determination by Treasury, the International Trade Commission found no injury cognizable under the Antidumping Act, and I must say that I can understand how that decision might have been reached despite the large volume of dumped sales and the high LTFV margins. Keep in mind that AMF was unable to present its case against the wide-spread price cutting on Japanese motorcycles until long after the imports had entered the United States. The Japanese made much of this at the ITC hearing. They emphasized that the LFTV margins had been found on motorcycles which had already been imported and which would not be subject to imposition of dumping duties even under a 90 day retroactive application of those duties (which, incidentally, Treasury had not ordered). They further argued that they had succeeded, by the time of the ITC hearing, in clearing out their huge inventories, and therefore there would be no further need to dump.

We argued that market price levels had been suppressed, and that these low prices had forced AMF's Harley-Davidson division out of the market for lightweight motorcycles and prevented Harley from entering the medium-weight sector of the market. But I must concede that, even if we had won the case, the value of our victory would have been open to some question. The damage had already been done, and duties would not—could not—have been applied to the dumped imports. The value of the dumping finding would have been to prevent future use of this tactic if the Japanese firms should again find themselves with an excess inventory problem.

The motorcycle case thus illustrates a major inadequacy of the present dumping laws. Where foreign manufacturers have U.S. selling subsidiaries—as is often the case today—they can use those subsidiaries as a repository for their excess inventory and, in times of slack markets, make the United States the dumping ground for excess production—all with no risk under the present law.

Moreover, I fear that unless our dumping laws are revised to provide the U.S. Producer an effective remedy in this type of "inventory dumping" situation, it is quite likely that this marketing strategy may be deliberately employed by foreign manufacturers in the future. Once a U.S. selling subsidiary is established, it can be used as a vehicle for delayed dumping by building up inventory stocks, perhaps equal to several years of supply, storing them in the warehouses of its U.S. subsidiary or affiliates, and eventually selling at dumped prices. Even if a dumping finding were made, it would come too late to prevent that manufacturer from achieving a significant U.S. market share, driving U.S. competitors out of the market and ultimatedly avoiding the dumping finding by adjusting prices upward on resales of merchandise imported after the filing of the dumping petition.

What we badly need is a remedy in damages to supplement the present prospective duty remedy. That remedy need not be—indeed, should not be—a treble damage remedy. Single damages would suffice. Moreover, it should be operative only where the U.S. industry can show the same level of material injury now required under the Trade Agreements Act, and where individual firms can demonstrate the extent to which they have been damaged. But there should be no requirement of proving any specific anticompetitive intent on the part of the foreign seller.

This is not protectionism. AMF is an international corporation, and has a strong interest in the expansion of trade. But AMF also supports strong antidumping laws to ensure that trade will be conducted fairly. The changes which we propose in the

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1916 Act would not prevent any fair value imports. Indeed, they would not prevent any less-than-fair-value imports unless those imports reached levels which cause or threaten material injury to U.S. industries. What these changes would do, however, is to close a major loophole in the present law and prevent foreign sellers from structuring their dumping activities in such a manner as to evade the sanctions of U.S. law.

Senator RIBICOFF. Mr. Rubin?

STATEMENT OF SEYMOUR J. RUBIN, MEMBER OF THE BOARD, CONSUMERS FOR WORLD TRADE

Mr. RUBIN. Thank you very much, Mr. Chairman.

My name is Seymour Rubin. I am a member of the board of directors of Consumers for World Trade, a nonprofit organization formed in 1978 in support of open, competitive and fair international trade.

I appear here on their behalf as well as on my own behalf, my credentials being that I was the legal adviser to the U.S. delegation that negotiated the General Agreement on Tariffs and Trade in 1947 and at the same time Assistant Legal Adviser for Economic Affairs in the Department of State.

I have followed trade matters as an impartial, I trust, observer for a great many years. I am at the present time a professor of law at American University, a participant in various panels having to do with trade law of the American Society of International Law, of the Atlantic Council and so forth.

Mr. Chairman, I have submitted a statement which I would hope would be included in the record.

Senator RIBICOFF. Your entire statement will go into the record as if read.

Mr. RUBIN. Thank you sir.

I would like to turn my attention very briefly to a few of the major points that seem to be important.

The bill which is before you seems to me to have a number of defects, Mr. Chairman and Senators, if I may say so. It seems to me that the provision of a private remedy in this particular situation is not desirable. And I do not think that the provision of a injunctive remedy is desirable and I do not think treble damages, in particular, are desirable.

It seems to me that the private remedy problem will lead to what has been described on both sides as a chilling effect. The issues in connnection with dumping cases are sufficiently complex so as to open up the courts to a great many lawsuits. In this particular area that will, I think, have a very inhibiting effect on international trade at a time when such an inhibiting effect is particularly injurious to the United States.

So far as the injunctive remedy is concerned, others before me have mentioned the difficulties with that. There seems to be common agreement among the witnesses and Senator Danforth with respect to the probable difficulties with respect to treble damages.

A second point that I would like to make, Mr. Chairman, is the point which was made by your first witness, Mr. Cassidy, that the 1979 act has really not been tried out. It has a great many clauses which have to do with this particular problem. I believe that it would be appropriate to give some time for that act to be shaken

down and to see what results in the way of protection of American industry from unfair competition would be.

In the third place, Mr. Chairman, if I may turn my attention to the question as to whether there is a conflict with the General Agreement on Tariffs and Trade and the Antidumping Code, it is my opinion, as what I trust is an impartial legal observer, that article VI of the GATT does provide for a particular remedy. The remedy is one that we have in the law at the present time.

GATT does not provide for a private remedy, a claim for damages by private citizens. Certainly it does not provide for treble damages, since the remedy in article VI is just the levying of a duty which would take away the effect of the margin of actual dumping. It would be highly undesirable, particularly at this juncture of our international economic affairs, for the United States to depart from that particular principle.

Finally, Mr. Chairman, article III of the General Agreement on Tariffs and Trade speaks in terms of national treatment with respect to imported and domestic products.

It seems to me that to apply special remedies of this particular sort at this time—or indeed at any time—to imported products rather than include those imported products under the aegis of our own impartial domestic laws, be they Robinson-Patman Act, which might conceivably be amended, or the Sherman Act, to do that and apply a special law to imported but not to domestic products is to violate the principle of national treatment.

In this particular case, I speak as one who has been engaged for over 30 years in dealing with issues of private foreign investment and similar matters and have been dealing with codes of conduct for transnational corporations, codes of conduct on transfer of technology, codes of conduct on restrictive business practices and the OECD, the United Nations Commission on Trade and Development, and so on.

In all of those forums, the strong interest of the United States has been and is in protecting the doctrine of national equality and national treatment.

In a great many instances, we have had difficulty in trying to protect that particular principle. It would seem to me that the enactment of this legislation, at least in its present form, would give an opening to a great many others to suggest that the United States sees national treatment as a desirable international principle when it is to its own interest, in connection for example with protection with American investment abroad, but then it abandons that principle when it feels with respect to a particular trade issue that the principle does not need to be applied.

Finally, Mr. Chairman, I feel that our law at the present time, as included in the 1979 Trade Agreements Act, is adequate for present purposes and that, if in any case there should be need for amendment, you should look in the direction of possible revision of the Robinson-Patman Act to make that domestic legislation equally applicable to foreign imports.

Thank you.

Senator RIBICOFF. Senator Danforth?

Senator DANFORTH. I missed the last sentence. I am sorry.

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Mr. RUBIN. I was saying, Senator, that my own view is that legislation as it now exists is adequate, logically, in view of the 1979 Trade Agreements Act, but that were there to be an amendment considered to be desirable, I would think that the amendment should look in the direction of amending existing essentially domestic legislation, like the Robinson-Patman Act, to make it equally applicable to foreign products as it is to domestic products.

Senator DANFORTH. That, of course, is the intention. We are working with the 1916 Trade Act which is within the province of this committee. But, of course, the effort is to amend the 1916 Trade Act which does provide, as you know, treble damages for dumping in dumping cases. But to bring it up to date, to remove the verbosity of it, to use terms which are consistent with the 1921 act.

That, essentially, to track the same viewprint with respect to price discrimination that now exists in the domestic area in Robinson-Patman.

Mr. RUBIN. I understand the intent, Mr. Chairman, and I want to reiterate my opening statement that I favor not only open and competitive trade, but fair trade. And I do realize that there have been cases of dumping and that perhaps there may be some need for attention to those cases although my own career as a private practitioner leads me also to be somewhat skeptical of all allegations made by parties on one side or the other side.

Senator DANFORTH. I am not making any allegation at all. All I am saying is if price discrimination is something that is a wrong and is recognized as such by the Congress in enacting the Robinson-Patman Act, that same theory on price discrimination should apply whether or not the product is sold solely on the domestic market or whether it is sold both abroad and on the domestic market.

Mr. RUBIN. I suppose that is the case.

I have some question, however, about whether the intricacies of international trade and the problems of domestic trade are exactly the same and it does seem to me that the antidumping legislation here and the antidumping code and the antidumping provisions of article VI of the GATT all address a special kind of situation where, because of the international aspect of the trade, you have considerations that conceivably could not be taken into account in your domestic trade.

It is conceivable, I would say, that in certain situations the United States may decide in its international affairs not to press a course of conduct which it ordinarily would think is entirely appropriate domestically.

The case of the hostages in Iran springs to mind where you exercise restraint for what I consider to be very good reasons, both in the tactics of national policy. That kind of thing does occur in the international economics relations area.

We do not always press a claim, even as to the expropriation of U.S. property abroad, where the U.S. claimants would like us to do and has an interest in seeing us do.

Senator DANFORTH. I think you have done a very good job of expressing that problem; that is, our trade policy. It is said—there is a school of thought that our trade policy is something that has

been relegated to a secondary position with respect to other national intersts which we might be trying to obtain in foreign policy.

Mr. RUBIN. I would regret it if that were so.

I have studied this since 1947 in trade policy. I do consider that it does occupy a fairly prominent position in the hierarchy of interests in the U.S. Government.

Senator DANFORTH. Well——

Mr. RUBIN. I know there has been a very substantial effort made, of course, in the past years to open up foreign markets to American products. One of the problems I would have in relation to the legislation that you and others have proposed is the question of whether this phrase, "chilling effect," may not be applicable in that situation as well and the situation of chilling the efforts of others to come into the American market.

And there I do think that an organization like Consumers for World Trade has a special interest in the effect on anti-inflation policy in the United States.

I am entirely sympathetic with the view that predatory pricing, predatory dumping, and driving competitors out of the market has an ultimate inflationary effect. I do not know of many cases of that sort myself.

I do not know. Much of the literature indicates that there have been few cases of that sort.

You can go back to the old Standard Oil cases, but those are a long time ago.

Senator RIBICOFF. Thank you very much, Professor.

[The prepared statement of Mr. Rubin follows:]

STATEMENT

My name is Seymour J. Rubin. I am a member of the Board of Directors of Consumers for World Trade, a nonprofit organization formed in 1978 in support of open, competitive and fair international trade. I am also a Professor of Law at American University, teaching in the field of international business transactions. In 1947, when I was legal advisor to the United States Delegation involved in the original GATT negotiations, I was also Assistant Legal Advisor of the Department of State for Economic Affairs. Since 1948, until I became a professor in 1972, I have engaged mainly in the private practice of law, though holding from time to time several governmental positions. I have written extensively in the field of international trade and investment, was a member of the American Society of International Law Trade Panel and continue as a member of the similar panel of the Atlantic Council.

I appear here both in my personal capacity, and to represent Consumers for World Trade.

* * * *

I appreciate the opportunity to present my views to the Subcommittee.

1. As I have stated, the objective of Consumers for World Trade calls for fair as well as open and competitive world trade. I share the general opinion that dumping can be and often is an unfair practice. But, both as a practitioner and as a teacher, I have noted that definitions

of dumping differ, that justifications often exist and are generally recognized for some types of below-cost sales, and that ascertainment of relevant facts is frequently a complicated and lengthy process. In fact, the provisions of proposed Sec. 501(b) of the bill now before the Subcommittee make clear the complexity which often attends a determination of whether or not dumping has taken place.

2. In these circumstances, it seems appropriate to do away with the criminal sanctions of Section 801 of the Revenue Act of 1916, the Antidumping Act, as is proposed in the pending bill. On the other hand, the enactment of new civil remedies leading to possible treble damages seems extremely unwise, and, in my opinion, prejudicial to the interests of the United States.

3. Adequate remedies with respect to dumping already exist in American trade law. Chapter 2 of Title III of the Trade Act of 1974, an act which received very intensive scrutiny by the Congress, already contains provisions with respect to the Antidumping Act of 1921. Moreover, Chapter IV of the same Act deals with "unfair trade practices", and revises Section 337 of the Tariff Act of 1930, so as to deal explicitly with unfair methods of competition and unfair acts in the importation of articles the effect or tendency of which is to "destroy or substantially injure an industry . . . in the United States, or to prevent the establishment of such an industry . . . ." There is no doubt, also, that predatory pricing, or conspiracy designed to fix markets, or

lead to monopolization are acts cognizable under the domestic laws of the United States, whether occuring in foreign or interstate trade.

It seems clear that there is no lack of adequate remedy already on the books. Such problems as exist have to do rather with questions of proof. I do not believe that such problems are lessened by the apparent elimination of the question of intent in paragraph (a) of Sec. 501 of the present bill which requires a finding of below fair value sale (as defined) and that "the effect of such sale has been substantially to lessen competition or to restrain trade or monopolize any part of trade or commerce within the United States." Especially is this so when paragraph (a) is read in the light of the justifications listed in paragraph (b) of the same section. The bill itself makes clear that low prices, or differential pricing, are not necessarily in themselves acts which are unfair in either domestic or international trade.

I know that it has become customary to refer to "violation" of the Antidumping Act, and to consider that sales in the United States at what is technically known as "less than fair value" under the U.S. law are "unfair". It should be recognized, however, that this "unfairness" is of a different character from unfair competition which gives rise to claims for damages and injunctive relief under the laws of the United States. Dumping as Viner said, is a phenomenon of international trade, and is subject to the

very special considerations which govern that trade, including the agreements among nations to regulate the trade. One reason for its special character is that any calculation of whether dumping occurs is peculiarly subject to exchange rate variations. Mainly, however, the reason is that dumping is not "wrongful" in any sense unless it causes injury. It may indeed be advantageous to the importing country, and frequently is. Indeed, Milton Friedman (not always my own favorite economist, but nonetheless a Nobel Prize winner) has argued that dumping may well be of benefit to the importing country, that the United States gains from imports, not exports, which he regards as a cost. One need not regard this statement as a complete analysis of the issues involved in dumping to recognize that dumping may not only have its justifications but also its benefits.

I believe that it is in recognition of these realities that the law of the United States - and other trading nations - has traditionally given responsibility for enforcement of antidumping standards to governmental agencies, and has provided the remedy of assessment of special duties designed to offset the advantage attributed to dumping. Dumping has been regarded as an economic matter, not illegal or unlawful in the sense of a violation of antitrust or restrictive business practices laws, unless the standards established in those statutes are met. I believe this to have been, and to continue to be, wise policy.

4. There has been, as this Subcommittee well knows, considerable dissatisfaction with the administration of the U.S. Antidumping Act and in the 1974 Trade Act and the Trade Agreements Act of 1979 measures were taken to tighten that enforcement and to limit the discretion of the administering agency. The 1979 Act entered into force on January 1, 1980 and there has been no opportunity as yet to measure its consequences. Congress was praticularly interested in seeing that abuses, as it regarded them under the previous administration of the law, were corrected, which permitted dumping duties to go for years uncollected even after dumping findings. The Committee has enjoined and the Executive has undertaken to take strong measures to see that such problems do not recur. There is every reason, we submit, to believe that the antidumping law is a significant deterrent to dumping even where it is not invoked. Indeed, if there are gounds for apprehension, they may be on the other side, namely the risk that the Antidumping Act will be a deterrent to competition which would be desirable in the U.S. market. The important role of imports in anti-inflation policy should not be overlooked.

5. Adversary litigation, such as is provided in the present bill in allowing treble damage suits, is an inherently unsatisfactory method for dealing with complicated issues of international trade, including dumping. Prior to recent enactments, the general thesis was that a private party would set the wheels in motion and monitor actions taken, but

that investigations and actions were basically the responsibility of the Government. There have of course been dissatisfactions with this concept, which have resulted in changes. But it would be wise not to move further in the direction of these changes, at least until there has been more opportunity than at present to estimate costs and benefits. The cost of bringing and defending antidumping cases has reportedly risen more rapidly in recent years than the cost of legal services generally. Conceivably, thought ought be given to simplification, rather than to adding to the burden of litigation, with its resultant complications.

6. These considerations, issues such as whether defenses such as that of meeting competition, the role of competition in anti-inflation policy, and problems of "functional discounts" - the matters referred to in paragraph (3) of the announcement of these hearings seem to me to argue forcefully against an amendment of Section 801 which would enact a new private remedy. Additionally, there is the extremely important question of the international obligations of the United States. I recognize that the Congress has stated that the Antidumping Code is to be construed so as to be in conformity with the Antidumping laws of the United States; but our position internationally has been that such laws are in fact in harmony with that Code. The General Agreement on Tariffs and Trade has assumed increasing importance for the United States, perhaps especially in the light of the recently-concluded Multilateral Trade Negotiations, to which the 1979

Trade Agreements Act has largely been addressed. The GATT has several provisions of relevance to this issue of our international obligations.

Article III of the GATT provides for national treatment with respect to internal taxation and regulation - a principle which in many other fields the United States actively pursues, in the interests of our trade and investment. Even more directly relevant here is Article VI of the GATT, which deals with "Antidumping and Countervailing Duties". That Article, drawn in careful compliance with existing United States law, provides for the levying of a duty on a dumped product (if there is injury, etc.) "not greater in amount than the margin of dumping in respect of such product".

To subject imported products to treatment especially reserved for such products and not equally applicable to products of national origin would see, on any reasonable reading, to conflict with the requirement of Article III(4) of the GATT that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use". The applicability of existing antitrust law to all such transactions of sale or purchase, with equal force, to both domestic and imported products, makes it evident that the violation of this principle of

national treatment is not only wrong, prejudicial to an important and cherished American doctrine, but also not necessary to the advancement of American legitimate interests in fair trading practices.

The treble damage provisions of the bill under discussion are a clear violation of the explicit statement of Article VI that the remedy for dumping is a duty not larger in amount than the margin of dumping. That remedy is the only one authorized by Article VI. To add to that authorized remedy one which permits private suit, and private suit of a punitive nature, involving the assessment of damages three times the amount of dumping margin, is a repudiation of the GATT. The complexities of dumping economics and the likelihood of law suits in great volume in circumstances in which rebuttal has to be made against a prima facie case and in which collection of evidence for such rebuttal is bound to be burdensome and expensive would mean that the proposed legislation would inevitably have a chilling effect on international trade. That effect would go far beyond the legitimate objective of inhibiting unfair trade practices. It would, in my view, invite reprisal. Thus, not only would beneficial imports be made more difficult, to the detriment of the American economy, but the considerable effort which as been made in recent years to increase American exports would be undermined.

Recent events abroad, and here I have in mind the British moves to "countervail" against American private enterprise

which has been granted treble damage judgments, should remind us that trade is a two-way street. Even in American antitrust doctrine, the desirability of the treble damage remedy, in a day in which class suits are possible, has been seriously questioned by thoughful analysts. In this area of "unfair trade practices", which all agree is far from clear in cases involving allegations of dumping, both the remedy of a new private cause of action, and of treble damages in such causes of action, are poor policy. In this instance, appropriate policy and respect for international commitments dictate the same conclusion.

7. Finally, I would like to point out the enormous importance, from the viewpoint of American economic foreign policy, of strict adherence to the principle of national treatment, even were it not mandated. The American position in many forums in the past years has been to insist on national treatment, as for example in the codes of conduct or guidelines being negotiated in the Organization for Economic Cooperation and Development, the United Nations Conference on Trade and Employment, the United Nations Commission on Transnational Corporations, and elsewhere. The American stake in national treatment is very high. To reject it in one aspect of our international economic relations makes it difficult, if not impossible, to insist upon its validity in other vital areas.

S.J. Rubin
Washington, D.C.
March 11, 1980

Senator RIBICOFF. The committee will stand adjourned.

[By direction of the chairman the following communications were made a part of the hearing record:]

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR., ON THE UNFAIR FOREIGN COMPETITION ACT

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO TESTIFY AT THESE HEARINGS ON IMPROVING OUR ANTIDUMPING LAWS. THE HEARINGS ARE TIMELY AND IMPORTANT. YOU ARE TO BE CONGRATULATED FOR TAKING THE INITIATIVE IN THIS CRITICAL ISSUE.

IN THE 96TH CONGRESS, WE HAVE FOCUSED ON WAYS OF INCREASING INTERNATIONAL TRADE. THROUGH SEVERAL NEGOTIATING EFFORTS, INCLUDING THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, THE UNITED STATES HAS REDUCED MANY OF ITS BARRIERS TO INTERNATIONAL TRADE, IN RETURN FOR SIMILAR REDUCTIONS FROM OUR TRADING PARTNERS. THIS TREND IS A GOOD ONE; IT PROMOTES PRODUCTION, CREATES JOBS, ENCOURAGES EFFICIENT ALLOCATION OF RESOURCES WORLDWIDE, AND HELPS REDUCE OUR TRADE DEFICIT. AS LONG AS OUR COMPETITORS PLAY BY THE RULES, I THINK THAT AMERICAN WORKERS CAN MORE THAN HOLD THEIR OWN, TO THE BENEFIT OF WORKERS, BUSINESSES, AND CONSUMERS ALIKE.

HOWEVER, WITH THIS RELAXATION OF RESTRICTIONS ON IMPORTS, WE MUST ENSURE THAT NO ONE TAKES ADVANTAGE OF OUR VULNERABILITY. AS YOU KNOW, INTERNATIONAL TRADE COMPETITION IS NOT ALWAYS CONDUCTED FAIRLY. GOODS MANUFACTURED ABROAD ARE OFTEN SOLD IN THIS COUNTRY BELOW THEIR MARGINAL COST OF PRODUCTION OR BELOW THEIR PRICE IN THEIR HOME MARKET. IN EITHER CASE, THIS IS DUMPING, AND IT HAS IN THE PAST CAUSED MASSIVE DISLOCATIONS IN OUR DOMESTIC INDUSTRY.

THE DECEMBER 10, 1979, ISSUE OF BUSINESS WEEK DISCUSSES THE RECENT COLLECTION OF ANTIDUMPING DUTIES AGAINST $2.5 BILLION WORTH OF IMPORTED JAPANESE TELEVISIONS; THE INCREASE IN THE REFERENCE PRICES FOR STEEL UNDER THE ADMINISTRATION'S TRIGGER PRICE MECHANISM (TPM); AND THREATENED DUMPING ACTIONS BY DISAFFECTED U.S. INTEREST GROUPS RANGING FROM COKE AND DRAFT PAPER TO CHEMICALS, FLOAT GLASS, AND SEMICONDUCTORS. LARGE-SCALE, CONTINUOUS DUMPING IS CLEARLY INCREASING.

ONE OF THE BULWARKS AGAINST PREDATORY BEHAVIOR FROM ABROAD SHOULD BE THE REVENUE ACT OF 1916. HOWEVER, THIS LAW REQUIRES A PROOF OF INTENT TO INJURE DOMESTIC MARKETS BY THE IMPORTERS OF DUMPED GOODS IF ANY DAMAGES ARE TO BE COLLECTED BY THE INJURED U.S. PARTY. INTENT TO INJURE IS SUCH A DIFFICULT TEST THAT THIS LAW HAS NEVER BEEN SUCCESSFULLY USED IN ITS 64 YEARS OF EXISTENCE. AS A RESULT, NO AMERICAN COMPANY OR UNION HAS EVER COLLECTED DAMAGES. CLEARLY, WE LACK A COHERENT, ENFORCEABLE POLICY TOWARDS DUMPING. FOREIGN BUSINESSES AND THEIR U.S. IMPORTERS NEED TO KNOW WHAT CONDUCT THE LAWS FORBID, AND THE INJURED U.S. PARTIES MUST BE ABLE TO COLLECT DAMAGES SWIFTLY AND ENJOIN FURTHER DUMPING WHENEVER IT OCCURS.

AS THE COMMITTEE KNOWS, I HAVE INTRODUCED A BILL, S. 938, THAT WOULD ELIMINATE THE NEED TO SHOW INTENT TO INJURE. ALL THAT WOULD HAVE TO BE SHOWN IS THAT THE IMPORTED GOODS ARE KNOWINGLY BEING SOLD AT BELOW PRODUCTION COST OR BELOW SALE PRICES IN THE HOME MARKET. THE BILL WOULD ALSO INCLUDE DUMPING AS BEHAVIOR THAT VIOLATES OUR ANTITRUST LAWS AND WOULD THUS ALLOW PRIVATE PARTIES TO BRING SUIT IN U.S. COURTS FOR

TREBLE DAMAGES. NO LONGER WOULD THE INJURED PARTIES HAVE TO SIT ON THEIR HANDS WAITING FOR THE GOVERNMENT TO ACT. THE LAW WOULD BECOME ALMOST SELF-ENFORCING, AND THE DETERRENT EFFECT OF THE MEASURE WOULD BE ONE OF ITS GREATEST VIRTUES.

ON DECMEBER 6, 1979, I CHAIRED A DAY OF HEARINGS ON S. 938 BEFORE THE JUDICIARY SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS. THE TESTIMONY PRESENTED WAS PARTICULARLY PERSUASIVE, ESPECIALLY THE STATEMENT OF BETHLEHEM STEEL CORPORATION. I EXPECT THAT A SECOND DAY OF HEARINGS WILL BE SCHEDULED EARLY THIS SPRING. AT THAT TIME, I WOULD HOPE TO HEAR FROM REPRESENTATIVES OF THE U.S. TELEVISION INDUSTRY, THE SHOE INDUSTRY, THE TEXTILE INDUSTRY, AND THE MAJOR UNIONS, ALL OF WHICH HAVE EXPRESSED GREAT INTEREST IN THIS BILL.

AGAIN, MR. CHAIRMAN, I THANK YOU FOR ALLOWING ME TO TESTIFY AT THESE HEARINGS, AND I URGE YOU TO SUPPORT MY PROPOSAL.

96th CONGRESS - SECOND SESSION

HEARINGS BEFORE

SUBCOMMITTEE ON INTERNATIONAL TRADE

COMMITTEE ON FINANCE

UNITED STATES SENATE

CONCERNING

AMENDMENTS TO SEC. 801 OF THE REVENUE ACT OF 1916

(15 U.S.C. 72), THE "1916 ANTIDUMPING ACT"

STATEMENT

ON BEHALF OF

THE CUSTOMS LAW COMMITTEE OF THE

LOS ANGELES COUNTY BAR ASSOCIATION

PETER DEKRASSEL

CHAIRMAN

March 11, 1980

HEARINGS BEFORE
SUBCOMMITTEE ON INTERNATIONAL TRADE
COMMITTEE ON FINANCE
UNITED STATES SENATE
CONCERNING
AMENDMENTS TO SEC. 802 OF THE REVENUE ACT OF 1916
(15 U.S.C. 72), THE "1916 ANTIDUMPING ACT"

Mr. Chairman and Members of the Subcommittee:

My name is Theo B. Audett. I am an attorney admitted to practice law in the States of Washington and California, and before the United States Customs Court. From 1951 to 1963, I served as an Assistant Deputy Commissioner of Customs, Division of Appraisement, in Washington, D.C., and with responsibility for the administration of the Antidumping Act in the Bureau of Customs from 1953 until 1963. I accompanied the United States delegation to General Agreement on Tariffs & Trade in 1956 and 1961, as Customs Advisor, and represented the United States on the Panel of Experts with respect to dumping and subsidy problems, meeting at Geneva in 1959 and 1960. Since 1963 I have been engaged in the private practice of Customs law, as counsel to the Customs law firm of Stein & Shostak from 1963 to 1976 and Stein, Shostak, Shostak & O'Hara from 1976 to date, consulting on Customs Court and Customs administrative matters related principally to questions of appraisement, including dumping questions. I served as a member of the Committee on Customs Law of the American Bar Association in 1967 and 1968.

On my own behalf and on behalf of the Customs Law Committee of the Los Angeles County Bar Association, and Peter de Krassel, its Chairman,

the following views in opposition to the proposed amendments to the so-called 1916 Antidumping Act, Section 801 of the Revenue Act of 1916 (15 U.S.C. 72) are presented for the consideration of the Subcommittee on International Trade of the Committee of Finance, United States Senate. The proposed amendments are contained in Title V of S. 223.

As resort to legislative history will indicate, the Antidumping Act of 1921 was enacted largely because the 1916 Act had proven ineffective, due to the difficulties inherent in establishing the intent required. To now amend the 1916 Act to eliminate the intent requirement as proposed in Title V of S. 223, or to replace it with an "effects" test could expose importers to double jeopardy of such magnitude as to make the importations of any product competitive with United States products a virtually unacceptable financial risk.

Under the 1921 Act, as amended, dumping duties assessed retroactively against imports which have already been sold can be ruinous to an importer. If there should be added a further liability for treble or even single damages of an unspecified amount, payable to domestic manufacturers, labor unions, or others, as well as possible criminal liability, few importers could afford the risk, particularly in view of the frequency of dumping allegations in recent years.

It should further be noted that there is no provision in the 1916 Act, or in the proposed Amendments contained in Title V of S. 223, for the usual procedural due process safeguards. The 1916 Act does not require any finding of dumping by any Government agency as a prerequisite to

imposition of criminal penalties or the existence of civil liability. There was no provision in the law for such a finding in 1916, at the time of enactment. The chaos which would result from a multiplicity of actions filed in various courts, unsupported by any impartial investigation either as to sales at less than fair value or as to injury, is obvious.

Further, to provide a method for penalizing importers for alleged dumping without regard to the provisions of the Antidumping Act of 1921, as amended, would be clearly in violation of the international obligations of the United States, including obligations under the General Agreement on Tariffs and Trade.

It is submitted that the amendments to the Antidumping Act of 1921 contained in the Trade Acts of 1974 and 1979 provide domestic industry with adequate protection, without resort to an additional punitive measure of this nature.

The adverse effect upon consumers and the fueling of inflation by legislation which would severely inhibit imports is obvious.

Respectfully submitted,

Theo B. Audett

Peter de Krassel

Peter de Krassel
Chairman, Customs Law Committee

THE FERROALLOYS ASSOCIATION
1612 K Street, N.W.
Washington, D.C. 20006
[illegible]

March 28, 1980

The Ferroalloys Association represents almost all of the United States producers of ferroalloys for sale in the open market. The American ferroalloy industry has had considerable experience with imports sold at less-than-fair-value prices, usually to its severe detriment. Over the years, these LTFV sales have taken business, depressed prices and production and caused the ferroalloys industry and its members substantial injury.

The Ferroalloys Association vigorously supports amendments to the so-called Antidumping Act of 1916 such as those proposed. For the reasons discussed in Part 1, below, public policy requires that there be a reasonable and viable private cause of action for dumping. Only amendments to the current law, such as those discussed in Part 2, below, can provide this necessary remedy for injured parties.

1. The Need for a Viable Private Cause of Action

There are two compelling reasons for amending the 1916 Act to provide a workable cause of action to those injured by dumping.

First, fairness requires that the dumping victim have the right to obtain judicial relief for the harm he has suffered.

Dumping is an anticompetitive device, condemned by international agreement as both improper and illegal. In form, it is similar to a violation of the Robinson-Patman Act; and there is every reason to provide a domestic firm with the sort of private, judicial remedy provided by that statute.

Unfortunately, the Antidumping Act of 1921, even as amended in 1979, does not provide American industry with adequate redress for injuries suffered. While the 1979 amendments have, commendably, improved that Act's procedures and have reduced the gap between the time dumping begins and the imposition of a dumping duty, a significant gap remains; and there will still be a substantial period of time in which a foreign producer or importer can reap the unlawful benefits of dumping free of sanction. Thus, even the most vigilant domestic industry will suffer some unremediable harm from illegal dumping unless it is provided with an effective private cause of action to recover damages caused by the dumper.

The domestic industry's vulnerability is especially acute where a foreign producer uses dumping to establish a foothold in the U.S. market. This has happened in U.S. ferroalloy markets; and, despite the 1979 amendments, a foreign producer still has the advantage of using such a marketing technique until a petition is filed with little practical risk of serious adverse consequences.

Second, the availability of a private cause of action will greatly facilitate the effective administration of the dumping

laws. As is the case of enforcement of the antitrust laws by the Justice Department and the Federal Trade Commission, the threat and reality of private suits would provide a substantial supplement to the resources of the Department of Commerce and the International Trade Commission in their enforcement of the law in two respects. For one, those agencies will never have unlimited resources with which they can enforce the antidumping laws. They could maximize their productive use of the resources they have if, in some cases, the private action vehicle for statutory enforcement were available and used. Secondly, the threat of a private suit (and of having to pay damages) would provide a substantial deterrent to foreign producers contemplating LTFV sales of a given product, and would reduce thereby the number of dumping cases requiring private or public enforcement action.

2. The Nature of the Private Cause of Action

That never, in sixty-four years, has there been a successful private suit under the 1916 Act is the only evidence necessary to establish the fact that amendments are needed to provide an effective, viable private cause of action. The reason for this abysmal history is obviously not the absence of instances of injurious dumping. Rather, it is to be found in the requirement that a claimant prove the dumper's specific intent to destroy or injure an American industry.

This requirement is not one that is found in a comparable law such as the Robinson-Patman Act or is required to prove, for

example, per se (or other) violations of Section 1 of the Sherman Act. It is simply too strict, it poses too high a barrier -- one that both effectively discourages the bringing of meritorious private suits and virtually assures the defeat of those few which are litigated. This burden of proof, which would be needlessly great if the defendants were American companies, is especially unsurmountable where the intent one needs to prove is of entities whose decisions to dump are made in a country other than the United States.

The issue of intent is inextricably intertwined with the purpose of the private cause of action and the measure of damages it is to allow. To the Ferroalloys Association, the purpose of the private right to sue is not to punish the offender but rather to compensate firms for damages from an act which the international community recognizes as beyond the legal pale. Thus, the Association recommends limiting private actions to actual damages, with treble damages to be awarded only in the rare case where proof of specific predatory purpose is proven. Similarly, the private cause of action need not afford the injured domestic party the opportunity to obtain injunctive relief.

These changes in the relief provisions would then define a private right to sue which provides a meaningful opportunity for recompense: that is, by removing the intent element entirely (except where treble damages are sought). Proof of LTFV sales (allowing for the usual adjustments for differences in circumstances of sale and the like) and injury would then suffice to establish the cause of action without any proof of intent. While

proof of intent might naturally be seen as necessary to precede an award of punitive damages, there is no such need where only actual, compensatory damages are at issue. Where the dumper is to be liable only for actual, and not for treble, punitive damages, the private cause of action would rest on the same footing as other business tort suits, where proof of the traditional elements of the offense (here, LTFV sales plus injury) would establish the right to a private remedy.*/

The Association proposes that the amendments not permit any defenses other than those now available under the 1921 Act. The framework of the 1921 Act permits, for example, a foreign producer to defend on the ground of "functional discounts" by seeking to prove differences in the products sold or in the circumstances of sale in the two markets being compared. Likewise, the 1921 Act permits the foreign producer to use the "meeting competition" defense in claiming the absence of LTFV-sale-induced injury. Thus, the 1921 Act (as amended) already puts a substantial burden upon the party seeking to prove that dumping has occurred.

Ideally, an administrative finding of LTFV sales or of injury caused thereby would itself establish a non-rebuttable presumption of that element of a private cause of action. However, the Association recognizes that to make the administrative finding non-rebuttable proof poses certain difficulties; and, accordingly, it recommends that the administrative finding

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*/ However, if Congress should deem it necessary to maintain some intent requirement, the present test should be relaxed -- say, by requiring proof of no more than an intent to engage in LTFV sales, that is, proof that the sales were not somehow made "accidentally."

be made prima facie evidence, shifting the burden of persuasion to the defendant, but subject to the defendant's rebuttal.

The Association believes that amendments such as those proposed afford no inconsistency with the obligations of the United States under the General Agreement on Tariffs and Trade, or any other international agreement. In particular, the Anti-dumping Code agreed upon during the Tokyo Round of GATT is limited to government dumping proceedings and does not restrict the provision of a private action to redress harm done by a person's anticompetitive and tortious actions.

* * * * *

In conclusion, the Association commends the Subcommittee for its interest in these matters and urges the passage of legislation that provides American industry with the kind of effective, reasonable private cause of action which fairness and sound public policy require.

Respectfully submitted,

George A. Watson, President

STATEMENT OF RAY DENISON, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, BEFORE THE FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE ON AMENDMENTS TO SECTION 801 OF THE REVENUE ACT OF 1916 (15 U.S.C. 72), THE "1916 ANTIDUMPING ACT"

April 3, 1980

The AFL-CIO believes that fair trade requires effective remedies for those injured by unfair trade practices. Therefore the AFL-CIO supports the objectives of proposed amendments to Section 801 of the Revenue Act of 1916, known as the Antidumping Act of 1916. These amendments seek to provide meaningful remedies for industries or companies injured by the unfair trade practice of dumping.

Dumping is recognized nationally and internationally as an unfair method of shipping goods between countries. But the many laws of the United States fail to provide effective remedies for the findings of dumping.

Those who are injured by imports which are sold at prices that are below prices abroad can get some action under the 1979 Trade Agreements Act, which amends earlier antidumping laws and provides for the mechanisms for implementing the newly agreed international antidumping code. But there are no provisions for damages.

Section 801 is supposed to provide such a remedy, but the current law is unrealistic. The current provisions require that an industry which has been injured by dumping must prove intent to destroy the U.S. industry. In other words, the injured industry must be able to prove in court that it knows what was going on in the mind of a foreign exporter. The law also provides the remedy of treble damages and punitive damages. However, since it is impossible to meet the test of proving intent, the collection of damages does not occur.

Amendments are needed to remove the requirement for proving intent. It is also appropriate to provide for actual damages, because that is in keeping with U.S. and international law.

While most American workers injured by unfair trade would like to punish the offenders, it is important that actions be realistic. What is at stake in dumping is the life of a company or business and, in many instances, a total industry.

If the law actually provided for realistic remedies and actual damages, dumping could be deterred and U.S. jobs and production could be continued.

At this time, the tests of dumping in the current law are probably the only practical avenue available to industries, because national and international law and agreements now have recently been established using the "material injury" and the margin of dumping arrangements. A finding of dumping under current law should be enough to assure that damages could be assessed under U.S. law.

Damages to U.S. industry, firms and workers can be severe. For example, U.S. antidumping law requires proof of price differentials here and abroad that account for the injury. However, there may be injury from dumping for a long time before the injured are aware of it. Once they are aware of the injury, and that it was caused by dumping, still more time may be needed for proof of the case. Dumping continues to cause damages.

Labor unions have frequently requested that the government go forward on its own motion when dumping is occurring, since the information is available to the government, but not to the private sector.

The Subcommittee has heard reports of recent cases, such as Motorcycles from Japan, where foreign exporters, with U.S. subsidiaries, can

suddenly inventory large amounts of imported merchandise. They can sell the imports -- dump them -- here at depressed prices. Thus, they can escape any realistic remedy because current law is designed to put on a dumping duty, a deterrent from future dumping, and these goods are already in the U.S. The dumping is already accomplished. Damages would be a deterrent to inventory dumping.

Such "inventory dumping" can be an especially serious problem in a period of low demand and/or rapid international changes. U.S. laws must be able to meet these changing circumstances.

GENERAL TIME CORPORATION
a TALLEY INDUSTRIES Company

March 26, 1980

Mr. Michael Stearn
Staff Director
Committee on Finance
2227 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Re: Statement on the Predatory Dumping Act of 1916

Dear Mr. Stearn:

General Time Corporation welcomes this Committee's initiative in re-examining the Predatory Dumping Act of 1916, 1/ America's first attempt to deal with the problems of unfair price discrimination by foreign producers. We believe that there are three basic problems with the 1916 Act as currently written. First, it is totally ineffective. No one has ever won a case under it, and indeed very few people bother to bring complaints based on the Act, because of that perceived ineffectiveness. Second, it is unfair to foreign exporters, who must bear in mind the prospect of facing sanctions -- rather substantial ones, including treble damages -- for offenses defined differently than are violations under the U.S. antidumping laws. Third, like the other antidumping law, it does not prevent a foreign manufacturer from deliberately shipping in a large volume of merchandise at extremely low prices, grabbing its desired market share, and then raising its prices before an antidumping proceeding can be completed.

We believe that these overall defects can be remedied by restructuring the law so as to make it a complement to the administrative antidumping laws. Basically, our suggestion is to adopt the definitional structure of the antidumping laws, as amended last year, and apply that structure to situations not covered by the 1979 antidumping law.

Senator Danforth's proposal in S. 223 provides the framework for that restructuring. First, it incorporates the same criteria used in the current antidumping laws, thus providing courts with a detailed legislative and administrative

1/ Act of Sept. 8, 1916, ch. 463, §801; 39 Stat. 798; 15 U.S.C. § 72.

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history for application of an amended 1916 Act. This would prevent cases such as one which occurred in 1978, in which a District Court judge dismissed allegations under the 1916 Act because that Act contained an inadequate definition of foreign market value and the judge refused to use the more comprehensive structure of the Antidumping Act of 1921. 2/ At the same time, this gives the foreign producer and the U.S. importer one single standard -- that of the antidumping laws as amended by the Trade Agreements Act of 1979 -- to which to measure up.

In addition, Senator Danforth's proposal would expressly include the foreign exporter within the group of persons subject to penalties for unfair trade practices. At present, a foreign exporter's predatory conduct is not subject to the 1916 Act, because the 1916 Act only reaches persons importing or assisting in the importation of merchandise into the United States.

We further believe that S. 223's elimination of criminal penalties is appropriate. To our knowledge, no free-market economy considers violations of this type to be criminal in nature. Finally, we believe that S. 223 correctly recognizes the difficulties of obtaining information in cases like these, where the defendant possesses the best information of the violation. Consequently, a technique of expressly shifting the burden of proof once the plaintiff has established a prima facie case would provide a realistic way of ensuring that these cases are decided on the basis of the best possible information.

Beyond that, we would suggest two additions to Senator Danforth's bill. First, consistent with a restructuring of the 1916 Act to have it complement the administrative antidumping procedure, the standard of harm should be "material injury," as defined in the 1979 Trade Agreements Act, rather than the "substantial lessening of competition" language drawn from the Robinson-Patman Act. As a corollary to this change from Robinson-Patman Act to antidumping concepts, the provision for treble damages should be stricken. 3/ Treble damages would remain available to plaintiffs proving a clear case under the usual antitrust laws, but should not be made available for violation of an antidumping law.

The use of a standard of injury to the plaintiff, in place of a "meeting competition" defense standard, should subsume one aspect of the meeting-competition defense. In

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2/ OMC v. Pezetel, 461, F. Supp. 384, 408-409 (D. Del. 1978).

3/ However, punitive damages perhaps should be allowed for particularly egregious cases of dumping, such as dumping in violation of price assurances resulting from prior dumping cases.

examining the question of injury in a dumping context, the International Trade Commission has found that "no injury" is caused by dumped sales which are being sold in the United States below their foreign market value in order to meet the prices offered by U.S. industry or the prices offered by nondumped imports. At the same time, elimination of the meeting-competition defense would prevent a foreign exporter from justifying its dumping as necessary to meet the prices of other imports which are also coming in at dumping prices, as is not infrequently the case.

We believe that it is extremely important that the 1916 Act contain provision for compensation for dumping which cannot be caught by the administrative procedures. At present, the antidumping laws are, in essence, prospective in effect. Since relief is only granted after injury is proven, domestic industry is exposed to the potential of grave damage in the period between the time when unfair imports begin and the date of the antidumping duty order issued by the Secretary of Commerce. 4/ Even with the procedural improvements made in the Trade Agreements Act of 1979, the period between the time of initiation of proceeding and the final order can be as much as 14 months, 5/ on top of the time necessary for the injured U.S. industry to prepare its petition.

Conceivably, an alert domestic industry could see the injury coming before it actually occurs, and thus have its petition ready to go as soon as material injury can be shown, thus cutting out the 3-6 months of its own investigation. Nevertheless, since the law requires a showing of reasonable indication of injury within 45 days of the filing of the petition, in practice one does not file a petition until one has a solid injury case. That means that the industry is being injured during the entire period of the proceeding -- up to 14 months -- for which there is no remedy.

4/ While antidumping duties can be made retroactive from 90 days prior to the date of an affirmative preliminary LTFV determination, 19 U.S.C. 1673b(e), in practice this will only be done in certain special situations, such as where the importer is violating previously negotiated price assurances.

5/ 210 days from filing of petition to preliminary LTFV determination in complicated cases, plus 135 days for an extended final LTFV determination, plus 75 days for an ITC injury determination (if the preliminary LTFV determination was affirmative, it would only be 11 months).

In particular, there is nothing to stop a foreign exporter from arranging quick, massive sales to a major retail distribution network (either its own or a major U.S. chain), and, once having achieved a good market share and destroyed some portions of the U.S. industry, then adjust its prices up to fair value as soon as a dumping petition is filed by the remaining members of the industry. Some theoretical economists might say that this is all perfectly fine in that consumers have had the benefit of extremely low priced goods, while the stronger of the U.S. companies survive (albeit with enough injury to get a dumping finding). Such an argument would ring hollow to the employees, shareholders, and communities of the defunct manufacturers who are, in this example, economically efficient vis-a-vis fair competition, but unable to withstand the blows from massive, unfairly priced imports. Our proposal not only would permit those companies to recover damages for any injury which actually occurs, but should also serve to deter those dumped sales in the first place.

In conclusion, we believe that this initiative to modernize the 1916 Act should be welcomed and carried through by this Committee and Congress. It is not the purpose of such a revision to provide an "end-run" around the Commerce Department, which is charged with the administrative antidumping proceedings, although the revisions in the 1916 Act will have the healthy side-effect of providing a "private attorney general" remedy which should keep the Commerce Department on its toes. In actual practice, we would expect that use of the 1916 Act will be limited to egregious situations, in part because of a history of antitrust counterclaims against plaintiffs filing 1916 Act cases. Its importance, as with most laws, will be its effect as a deterrent. Foreign exporters, seeing this law in the books, will know that they cannot get away with the "hit-and-run" dumping which would be possible under the current dumping laws (under which a foreign company can dump for the entire length of the proceeding in some cases -- up to 14 months -- and then raise its prices to fair value and pay no duties). With these revisions to the 1916 Act on the books, that will not be possible. Consequently, we urge this Committee to give the measure its fullest consideration.

Respectfully submitted,

GENERAL TIME CORPORATION

By Mark S. Dickerson
Mark S. Dickerson
Assistant Counsel

COMMENTS OF DUDLEY H. CHAPMAN
CHAPMAN & CLEARWATERS
FORMERLY ASSISTANT CHIEF,
FOREIGN COMMERCE SECTION
OF THE ANTITRUST DIVISION,
U.S. DEPARTMENT OF JUSTICE

I appreciate the opportunity this Committee has given me to submit my views regarding S. 223.

The legislation proposed in Title V of S. 223 would make it unlawful to sell any imported article in the United States at a price lower than that for which it sells in its home market. While this reflects a common shorthand description of what is meant by dumping, it has never been adopted as such in the law and would prove unworkable if attempted.

The original antidumping legislation of 1921 drew a deliberate distinction between the existence of a so-called "dumping margin" between foreign and United States selling prices and the question of whether selling prices in the United States were for less than "fair value." This distinction is preserved in the Trade Agreements Act of 1979, and is essential to the fair application of the law.

As a matter of business reality, there are many justifications in specific instances as to why the same product will be sold at different prices in differing geographic locations. Even in the seemingly obvious case of discriminatory pricing by the old Standard Oil Company those allegations failed of proof in the case brought by the U.S. Government. Despite vast differences in prices charged it was shown in the trial of the case that differences in transportation costs, costs of shipping and services, competitive conditions in differing geographic markets, and the like provided legitimate reasons for differing prices in different geographic areas.

Within the United States there is a statutory prohibition of geographical price discrimination in Section 2 of the Clayton Act. Because it makes little commercial or competitive sense, that law has proved to be almost as dead a letter as the Antidumping Act of 1916. The difficulty, if not the impossibility, of showing that geographical price discriminations are unjustified was clearly demonstrated in the Anheuser-Busch case, (Anheuser-Busch, Inc. v. Federal Trade Commission, 289 F.2d 835 (7th Cir. 1961)). The extraordinary risk of enacting a simplistic geographic price discrimination law such as proposed in S. 223

is that it would exclude the possibility of raising the kind of defenses that resulted in the finding of no liability in the Anheuser-Busch case. It would amount to an unfair and discriminatory exclusion of imports.

The Committee should be cautioned that the term "dumping" has traditionally been used in a loose and imprecise manner to refer to a variety of frustrations felt by businessmen over what are in many cases perfectly legitimate competitive practices. Jacob Viner in his classic treatise on dumping noted at the outset that:

> "The U.S. Tariff Commission, in response to a questionnaire sent to American business concerns asking for a statement of personally known instances of dumping in the United States by foreigners, received complaints of 146 such instances, of which 146 complaints all but 23 resolved themselves upon analysis into charges of severe competition, threats, deceptive imitation and use of trade-marks, exploitation of patents, imitation of articles, deceptive labelling, or customs undervaluation, and only the remaining 23 instances were alleged cases of price-discrimination...." (Viner, Dumping and Problems in International Trade (A. M. Kelly 1966 Reprint).

When stripped of these peripheral legitimate types of competitive action and other types of offenses, the essence of dumping consists of a deliberate undercutting of domestic prices that cannot be justified as normal competitive behavior. The proposal in S. 223 is not so limited. By making a finding of dumping follow from the mere existence of a difference in the foreign and United States selling prices it would bar prices that do not even undercut the United States domestic price if the prevailing United States price happens to be lower than that in the foreign market. No meeting competition or other defenses -- even those found in the Robinson-Patman Act -- are found in this legislation.

The 1921 Act (as the 1916 Act before it) was enacted in response to complaints of foreign underselling of American goods, at prices so low that American firms could not match them and stay in business. The explanation for such behavior by foreign producers was said to be that they could sustain losses here from monopoly profits abroad, and by destroying their American competition establish another monopoly in the United States market. The Tariff Commission was consulted by Congress in its advisory role on the formation of antidumping policy, which resulted in its 1919 Report on Dumping and Unfair Foreign Competition. The conclusions in that report were based in part on a comprehensive questionnaire sent to various trading interests and manufacturers to learn the bases of

their complaints against dumping and other unfair trade practices. This report, in listing instances of dumping, consistently described the evil complained of as sales prices in the United States market far below the prevailing U.S. price level. For example, the Commission reported:

> "Harness Leather-Canadian harness leather is, in normal times, sold in the United States at less than its market value in Canada, at less than the market value of a corresponding quality of leather made in the United States, and at lower prices than the American can meet. . . .
>
> "Cigar Bands-There have been many times when German bands have been sold in this country at much less than the cost of manufacture in this country and undoubtedly less than the cost of manufacture in Germany." 1919 Report, pp. 13-14.

The main villain of the dumping controversy which led to both the 1916 and 1921 Acts appears to have been the German organic chemical industry and its predatory pricing practices. Both antidumping legislation generally and the American selling price system of duty on chemicals specifically were aimed at underselling by the German dyestuffs cartel.*/ Complaints to the Congress of the actions taken towards infant U.S. chemical producers**/ are reflected in the language of the Act aimed at dumping which prevented the establishment of an industry (19 U.S.C. §160(a)). These German practices, like the other dumping complaints, were characterized by undercutting of domestic prices as an essential element of the practice.

Under a heading titled "Explanation of Dumping Practices," the Commission's 1919 Report discusses the injury concept as injury caused by actual or threatened underselling, not by meeting prevailing price levels:

> "Insofar as the dumped merchandise is not made or produced in the country of sale, the transaction is one to which the latter country is not ordinarily disposed to object. The problem arises from the competitive pressure of

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*/ See Testimony of Dr. Charles H. Herty, Senate Finance Committee Hearing on Emergency Tariff and Antidumping, 67th Cong., 1st Sess., p. 129-131.

**/ See Senate Finance Committee Hearings on Emergency Tariff and Antidumping, 67th Cong., 1st Sess., pp. 129-131.

> these reduced prices when the dumped goods are similar to those domestically produced. Dumping, from this standpoint, is a form of competition having extreme, and unpredictable manifestations. As such, it departs, in a measure from the ordinary conditions of domestic supply and demand and introduces elements which are met, if at all, with apprehension and difficulty. The dumping of goods may have the effect of forcing domestic manufacturers to sell their entire output at a small margin of profit, or even at a loss. Moreover, even the quotation of dumping prices, though no sales in fact be made, may occasionally result in compelling merchants with established trade to cut their prices in order to hold their business against threats of dumping competition." (Tariff Commission Report, supra, at 20).

The Commission was careful to distinguish dumping from severe competition:

> "By the same test of definition, severe competition, however successful it may be, is not dumping. Indeed, unless featured by other elements of undue or improper advantage, such competition is not even unfair, as that term is at present customarily applied. If the restriction of severe foreign competition, when unmarked by lower foreign than domestic prices, is deemed solid economic policy, it should be proceeded within its tariff aspects, entirely apart from the problem of dumping." (id at 11).

The Congress reflected the same understanding of dumping, as stated in the reports accompanying the bill which placed great stress on sales substantially below domestic price levels:

> ". . . .[the bill] protects our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed, whereupon the dumping ceases and prices are raised [sic] above former levels to recoup dumping losses." H. Rept. No. 1, 67th Cong., 1st Sess. (1921) p. 23 (Emphasis added).

Selling prices which do not undercut domestic prices may be categorically excluded from the evils described above. Absent such undercutting, the harm which Congress feared simply cannot exist.

Indeed, if antidumping legislation were not so restricted it would itself constitute an aid to monopoly through the hand of government. The authors of the initial legislation of 1921 were careful to avoid this risk:

> "Mr. King: But may I not inquire of the Senator if it is not possible for this antidumping provision to be so administered as that it may perpetuate a monopoly existing in the United States, or permit manufacturers in the United States to augment the prices they are charging to the public?
>
> Mr. McCumber: I do not think that is possible.
>
> Mr. King: If the Senator will pardon me, it is the theory of the antidumping provisions, as well as all the provisions of the bill, to restrain the fall of prices, or to maintain existing prices, or to increase them.
>
> Mr. McCumber: No; the purpose of the bill is to prevent an attempt by any foreign producer to dump his goods into the United States for less than cost for the purpose of destroying an industry in the United States. In other words, we want to perpetuate our industries of every character in the United States so far as we can." 61 Cong. Rec. 1022 (May 4, 1922).

The Antidumping Act of 1916 was passed in response to a particularly egregious form of deliberate undercutting of a kind that has been extremely rare in actual experience. Any conduct that egregious could easily be reached under existing antitrust legislation. To the extent that an administrative remedy for less severe practices is needed, the Trade Act of 1979 should be tested before further legislation is considered. That Act represents the result of far more experience and thinking than went into the earlier and primitive legislation of 1916. The new Act together with existing antitrust legislation should be adequate to provide all the protection needed to protect against truly unfair import competition. The Act of 1916 has proved not only useless, but a menace, as the one case brought under it has dragged on and grown to the monstrous proportions of a major antitrust suit. The only function it appears to serve is as a means of harassment.

On the basis of this discussion I would urge that the Committee decline to report S. 223. I would also urge that the Committee address the question as to whether the 1916 Act should simply be repealed.

HEARINGS ON AMENDMENTS TO SECTION 801

OF THE REVENUE ACT OF 1916 (15 U.S.C. 72),

THE 1916 ANTIDUMPING ACT

before the

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

SENATE COMMITTEE ON FINANCE

Sharretts, Paley, Carter & Blauvelt, P.C.
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Peter O. Suchman
Gail T. Cumins

April 2, 1980

We oppose the proposed amendments to the Antidumping Act of 1916 contained in S. 223. We believe this proposal to be ill-advised and unnecessary especially in view of the fact that only a matter of months have past since passage of the Trade Agreements Act of 1979 (T.A.A. 1979) (which became Public Law 96-39 on July 26, 1979), an Act which supposedly embodied principals of trade liberalization by implementation of the Multilateral Trade Negotiations. The ink has barely dried on the new international agreement on antidumping practices, and the Congress has before it a proposed amendment to U.S. law which would amount to a unilateral abrogation of that agreement. This blatant attempt to undermine years of effort to negotiate controls on the use of non-tariff barriers to trade should be rejected out of hand by this Committee.

The Antidumping Act of 1916 has never been successfully utilized by domestic industries because of the inherent difficulty in demonstrating "the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" as the statute requires.

This element of intent, necessary under our legal system in a criminal statute, was purposely removed from the 1921 Antidumping Act, which was designed to be remedial not punitive in

nature. Under the 1921 Act those engaged in trade could avoid any penalty by simply adjusting prices to remove, in the future, any discrimination that may have existed between markets. This statute recognized that price discrimination between markets where no intent to destroy or monopolize competition is present is a normal business practice which actually fosters competition, and only becomes objectionable when the requisite injury to domestic producers is demonstrated. In recent years, however, inefficient domestic industries have become increasingly dissatisfied with this scheme of things - they don't want mere remedial action, they want the threat of unsupportable financial penalties on their foreign competition to assure their U.S. market shares. As a result recent amendments to the Antidumping Act (1921) and the regulations and administrative practice implementing it have become increasingly arbitrary and punitive. To cite one example, the T.A.A. 1979 amends the 1921 Act to provide for the payment of estimated duties following a dumping finding and pending final assessment, in contrast to the previous practice of requiring only a bond to cover any possible liability. This change was not made because of wide-spread default on these bonds (as far as we are aware there has never been a default on an antidumping bond) - but to increase the cost and uncertainty for importers involved in antidumping proceedings.

In a continuation of this trend this proposal would amend the 1916 Act, and by removing the requirement of intent make it a readily available weapon for domestic industries who may seek treble "damages" from foreign manufacturers who sell in the U.S. at less than foreign market value, "and where the effect of such sale has been substantially to lessen competition or to restrain trade or monopolize any part of trade or commerce within the United States." This is a very weak test at best. The plaintiff is not even required to show that a U.S. industry has been materially injured. Furthermore, the amendment would shift the burden to the defendant of proving, once a sale at less than fair value has been demonstrated, that the requisite "lessening, restraining or monopolizing" has not occurred. In effect the defendant must prove that he is not guilty - hardly a concept in keeping with the generally accepted principles of English Common Law and American jurisprudence.

The proposed legislation is objectionable, additionally, in that while it appears to be aimed at the foreign manufacturer or exporter, in practice it will be enforceable only against his merchandise. This will inevitably lead to lengthy and expensive legal proceedings involving successful plaintiffs seeking execution of judgment, and importers seeking to prevent that execution by contesting assertions that title to merchandise which can be reached by the order of a U.S. District Court has not passed.

The legislation is vague and confusing. It cites the applicable provisions of the Antidumping Act of 1921 (since replaced by Title I of the T.A.A. of 1979) as controlling for determining purchase price, exporter's sales price, foreign market value and constructed value, in subsection (d), while at the same time introducing entirely new concepts for making adjustments to these prices in subsection (b). Since actions under the statute are to be brought in U.S. District Courts, which have no expertise in the application and interpretation of the "non-punitive" anti-dumping laws, we are only left to wonder what these provisions may mean. The potential losses to the most law-abiding of businessmen are thus magnified by the inability of even experts in this field to determine ahead of time what pricing practices may subject him to treble damages. Furthermore, it must be kept in mind that even under this existing "remedial" antidumping legislation, the calculation of dumping margins is far from a mathematical exercise. The imprecisions inherent in these comparisons are already unjustly burdensome to importers and exporters - these proposals would make that burden intolerable.

The overall vagueness of this legislation, coupled with the reversal of the burden of proof, raises serious due process questions and certainly indicates an indifference to equity and fairness not in keeping with the basic tenants of our legal system. The most persuasive argument against enactment however is that it would be a direct and blatant violation of our international obligations.

The newly amended International Anti-Dumping Code sets forth in great detail, as the result of painstaking multilateral negotiations, the criteria for the application of antidumping remedies. Spokesmen for the United States have been able to maintain up until now that the 1916 Act is outside the scope of this Code and its predecessor because it is a criminal statute, requiring a showing of premeditation to cause injury or monopolize trade. These amendments would, as indicated above, remove that requirement. The amended Act would then violate the international agreement in two basic ways: it would not require a showing of material injury before remedies could be applied, and the statutory remedy of treble damages would be totally inconsistent with the agreement requirement that the antidumping remedy be limited to a duty not to exceed the margin of dumping. Additional inconsistencies with the Code are too numerous to mention.

The containment of the use of antidumping practices, to prevent their abuse as a non-tariff barrier to trade, has been a major objective of our trading partners for about 20 years. They have bought and paid for American agreement to limit these practices in two major rounds of GATT trade negotiations. It would strain the multilateral trading system perhaps beyond repair for the United States to undo that agreement within a matter of months by passing this proposed legislation.

Respectfully submitted,

SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.

By: _____
Peter O. Suchman

By: _____
Gail T. Cumins

Questions to the Administration From the Subcommittee

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

June 11, 1980

Mr. Robert C. Cassidy, Jr.
General Counsel
Office of the U.S. Trade
Representative
1800 "G" Street, N.W.
Suite 715
Washington, D.C. 20506

Dear Mr. Cassidy:

As you recall, the Subcommittee on International Trade held a hearing earlier this year on potential amendments to the so-called 1916 Antidumping Act (section 801 of the Revenue Act of 1916 (15 U.S.C. 72)). During the hearing, it was indicated that the Subcommittee would submit some questions relating to this subject for response from appropriate agencies within the Administration (e.g., the Justice Department, the U.S. Trade Representative, or other agencies, as the case may be).

I would appreciate it if you would see that an expeditious response is forthcoming from the appropriate agencies to the following questions.

(1) What is the purpose of the 1916 Antidumping Act as it exists today? What is the relationship of the 1916 Antidumping Act to other U.S. statutes (title VII of the Tariff Act of 1930, the Sherman Act, the Robinson-Patman Price Discrimination Act, etc.)? How do the criteria of the 1916 Antidumping Act differ from the criteria of the other statutes mentioned?

(2) What should be the purpose of the 1916 Antidumping Act, e.g., to compensate individuals for damages to them resulting from dumping, or to punish dumping undertaken with specific intent, including an intent to lessen competition or restrain or monopolize trade?

(3) What changes in the criteria of the 1916 Antidumping Act should be made? If compensation (single damages) is stressed, should a specific intent still be required? If prevention of anti-competitive activities is to be stressed, should the present intent requirement be changed to impose an "effects" test?

(4) What defenses should be available against an action under the 1916 Antidumping Act, e.g., meeting competition, functional discounts, and so on?

(5) Should remedies under the 1916 Antidumping Act include injunctive relief of either a permanent or temporary nature?

(6) Are special provisions needed in the 1916 Antidumping Act on such matters as enforcement of judgments and venue?

(7) How should the 1916 Antidumping Act procedures and determinations, and procedures and determinations under title VII of the Tariff Act of 1930, interrelate, e.g., what affect should an administrative determination under title VII on such matters as the existence of dumping, the amount of dumping margins, and injury have on court proceedings under the 1916 Antidumping Act, or vice versa? Should proceedings under the 1916 Antidumping Act and title VII of the Tariff Act of 1930 be permitted to run concurrently, or should one action precede the other, and if so, which one?

(8) What is the relationship of amendments to the 1916 Antidumping Act to the international obligations of the United States, including obligations under the General Agreement on Tariffs and Trade and the subsidies/countervailing duty agreement negotiated in the Multilateral Trade Negotiations?

The Subcommittee appreciated your appearance before it during the hearing on the 1916 Antidumping Act, and we look forward to an expeditious response to these questions.

Sincerely,

Abraham Ribicoff
Chairman
Subcommittee on International Trade

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

September 3, 1980

The Honorable Abraham Ribicoff
Chairman, Subcommittee on
International Trade
Committee on Finance
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of June 11 with follow-up questions on the International Trade Subcommittee hearings on the 1916 Antidumping Act.

Before answering the eight questions you posed, I want to describe briefly the 1916 Act and to put the answers in context. That Act provides for both criminal sanctions and civil treble damage remedies to redress what is essentially predatory dumping. In order to recover treble damages under the Act, a plaintiff must show three elements:

-- predatory intent,

-- the seller made sales in the United States at prices "substantially less" than the seller's comparable home market sales price of the product, and

-- the seller dumped imports "commonly and systematically".

Let me address each of your questions in order.

(1) The purpose of the 1916 Act is to provide criminal penalties and a treble damage remedy where dumping practices are "predatory". For example, if a foreign monopolist in an industry were consciously to dump as part of a scheme to eliminate U.S. producers and obtain a monopoly position in the United States, such conduct would likely be condemned by

the Sherman Act and could under that Act, as well as under the 1916 Act, subject the foreign party to criminal penalties as well as treble damages. */

Although the Act and Title VII of the Tariff Act of 1930, as amended, both provide remedies for injury from dumping, they do so in different manners. Title VII defines dumping more broadly than the 1916 Act in three major respects. First, under Title VII, dumping ("sales at less than fair value") can involve not only actual price discrimination between national markets but also selling below the fully allocated cost of production. Second, the 1916 Act is essentially limited to price discrimination in the sale of goods of like grade and quality whereas Title VII can reach price discrimination in the sale of "such or similar merchandise" thus permitting adjustments in calculations for differences between similar products sold in the two markets. Third, Title VII does not require the showing that must be made under the 1916 Act that U.S. sales are made at a price "substantially less" than the seller's home market price, that the seller dumped imports "commonly and systematically," and that the seller had predatory intent.

The 1916 Act is in some ways similar to Section 2(a) of the Robinson-Patman Act, which provides a comparable remedy in instances when both the favored and disfavored sales occur in the United States. **/ Indeed, in recent "primary line" cases under the Robinson-Patman Act, where the price discrimination causes injury to the competitors of the seller, the courts have required a showing of predatory intent before a violation

*/ There has been little litigation under the 1916 Act, and it is therefore difficult to predict the extent to which a court would require proof of all of the Sherman Act elements of an attempt to monopolize as a predicate to liability under the 1916 Act. In view of the 1916 Act's emphasis on intent, it might be unnecessary to establish the dangerous probability of success that has frequently been held a requirement of liability under Section 2 of the Sherman Act.

However, the 1916 Act refers not only to intent to monopolize or destroy a domestic industry, but also to intent to injure a domestic industry or restrain trade. Liability under the 1916 Act, therefore, may attach in situations not reached by Section 2 of the Sherman Act.

**/ By its terms, the Robinson-Patman Act does not apply to cases where one of the transactions being compared takes place outside of the United States. Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 402 F. Supp. 244 (E.D. Pa. 1975).

will be held to have occurred and treble damages awarded. ***/ Predatory intent in this context is interpreted consistent with Section 2 of the Sherman Act. Thus, in "primary line" cases, which are analogous to antidumping cases, the courts have imposed on those claiming to be injured by low-priced sales a burden similar to that now required under the 1916 Act.

However, for the reasons set out more fully below in response to question (4), we would caution against overextending the analogy between the 1916 Act and the Robinson-Patman Act. Foreign sellers often have less access to U.S. market information and face difficulty in penetrating U.S. markets at prices comparable to those of its U.S. competitors. These factors may make it inappropriate and anticompetitive to apply inflexible price discrimination rules in the international context.

(2) The purposes of the 1916 Act are, and should be, both of those you cite. The 1916 Act should provide punishment for those who are dumping and compensation for those injured by dumping of the kind proscribed by the Act. We believe, however, that the existing Act provides the necessary remedies for dumping and that changes in the criteria or focus of the 1916 Act to extend its reach are inadvisable.

(3) We do not feel the criteria of the 1916 Act should be changed at this time. As the 1916 Act is properly designed to prevent predatory dumping, the notion of intent is an important element of that law. Amending the 1916 Act by imposing criminal and single or treble damage liability on a foreign seller without requiring that he know that he was dumping would be a radical change in the Act's scope. As we have experienced under the administrative antidumping law, the determination of whether a sale is at "less than fair value" is a very complicated procedure. To arrive at the fair value determination under Title VII, the Commerce Department may average home market prices or use sales to third countries or even a constructed value. In many situations, it is extremely difficult for a foreign manufacturer to calculate with any precision the 'fair value' of his product so that he may know whether he is dumping. Indeed significant constitutional questions are suggested by a statute which would impose criminal sanctions without a showing of intent, particularly where the "criminal" nature of the conduct often is ascertainable only after a very complex investigation.

***/ See, e.g., Pacific Engineering & Production Company of Nevada v. Kerr-McGee Corporation, 551 F. 2d 790, 798 (10th Cir. 1977), cert. denied 434 U.S. 879 (1977); International Air Industries, Inc. v. American Excelsior Co., 517 F. 2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976)

In light of the liability faced by foreign sellers found to be dumping (i.e., plus single or treble damages), if the Act's predatory intent requirement were eliminated foreign enterprises might refrain from even attempting to compete in the U.S. market. To minimize the risk that their judgment on the permissibility of a certain price level may differ from that of a U.S. court or federal agency, foreign sellers may simply increase prices to avoid any doubt. Thus, the positive impact of fairly priced foreign imports on domestic competition would be significantly reduced.

In those cases where dumping practices are predatory -- for example, if a foreign monopolist were consciously to dump as part of a scheme to eliminate U.S. producers -- the Sherman Act and the 1916 Act prohibit such practices and subject the foreign party to criminal penalties as well as treble damages.

We also are concerned that the imposition of penalties and assessment of damages on an importer in circumstances other than those now provided under the 1916 Act may conflict with the provisions of the Antidumping Code, agreed to as part of the Tokyo Round of Multilateral Trade Negotiations. The new Code permits the imposition of antidumping duties only when a domestic industry is materially injured or threatened with material injury from dumping. Under Article 8 of the Code, the amount of the dumping duty may not exceed the margin of dumping. The imposition of additional penalties and damages in this context may be inconsistent with these Code provisions.

An expansion of the 1916 Act may also encourage some of our trading partners to retaliate with similar measures of their own. The consequences of such actions could be a reduction of American export opportunities and injury to American businesses that could outweigh any benefits from an expansion in the 1916 Act itself.

(4) As long as the present predatory intent requirement is part of the Act, we do not believe it would be advisable to incorporate explicit "meeting competition" or "functional discount" defenses. The fact that a foreign seller's low prices in the United States were intended to meet competition or to reflect functional discounts should, under the existing law, be relevant and admissible to show that the prices were not set with predatory intent. Those defenses are incorporated in the Robinson-Patman Act to provide a defense where liability might otherwise be predicated on a mere price differential, without regard to the seller's intent.

There is no assurance that a "meeting competition" defense as such would work well in the international context. Foreign companies may have a more difficult time than American companies in tailoring their sales to anticipate such a defense, since they may face considerable information, distance and language barriers, and are more likely to be dealing through agents and intermediaries. A "meeting competition" defense may also be inadequate for purposes of determining whether foreign-source goods are truly meeting domestic competition. To meet U.S. competition, imported goods must often slightly undersell U.S. goods. Incorporating a "meeting competition" defense into the law could have the effect of precluding a foreign seller from offering evidence of such a situation.

(5) We assume that most domestic interests would not seek an injunctive remedy under the 1916 Act without also filing a petition asking the Commerce Department to begin an administrative antidumping investigation. As a practical matter, therefore, injunctive relief in 1916 Act cases would be largely duplicative of remedies available under Title VII and thus there appears to be no practical need to add equitable remedies to the 1916 Act.

As a practical matter, obtaining preliminary relief in a court under the 1916 Act might be no more expeditious or effective than under the administrative remedy. In the latter context, when Commerce makes a preliminary affirmative determination, an importer is required to post a cash deposit or bond ensuring the payment of estimated dumping duties in most cases 160 days after the petition is filed. (19 U.S.C. 1671b(d)). Further, when Commerce determines the existence of "critical circumstances," Commerce requires the importer to post a similar cash deposit or bond to cover imports entered up to 90 days before publication of the critical circumstances determination (19 U.S.C. 1673b(e)).

In cases in which dumping is found to violate the standards of the present 1916 Act, the Act provides a fully adequate remedy at law in the form of damages. As a practical matter, therefore, in such cases there ordinarily will be no irreparable injury to firms for which injunctive relief is the appropriate remedy.

(6) We do not believe there is a need for special venue provisions for actions brought under the 1916 Act. The general venue rules applicable to civil actions in federal district courts provide for venue in a suit against a corporation wherever the corporation is incorporated, is licensed to do business, or is doing business. Venue in suits against a foreign defendant is broader still, as an alien may be sued in any district. 28 U.S.C. 1391.

As for judgments, if a defendant in a 1916 Act case has assets in the United States, those assets would be as available to satisfy a judgment as they would in any action in which damages were awarded. If the only assets against which a judgment could be executed were located abroad, a plaintiff's ability to recover would be contingent upon a foreign court giving full faith and credit to the U.S. court's judgment.

It is unlikely, however, that any U.S. law could enhance a plaintiff's ability to reach foreign-located assets. It should be noted that Great Britain and Australia, to address what they perceive as overly-broad extraterritorial reach of U.S. antitrust laws, already have enacted legislation to hinder the recovery of treble damage judgments in their courts. Indeed, Great Britain permits re-recovery by its nationals of the penal two-thirds of treble damages recovered by plaintiffs through execution of U.S. judgments in the United States. Similar legislation is now pending in Canada. There is a serious danger that any new U.S. law purporting to expand the ability of U.S. plaintiffs to execute treble damage judgments against foreign-located assets would invite similar retaliation from our trading partners.

In short, the issue of enforcing judgments is difficult, and can probably not be improved simply by clarifying the 1916 Act. It will involve many broader issues and other laws, and should not be addressed solely in this context.

(7) As noted above, the definition of dumping is significantly broader under Title VII of the Tariff Act of 1930 than under the 1916 Act. Therefore any prima facie acceptance for purposes of the 1916 Act of determinations as to the existence and margins of dumping made under the Title VII administrative process should be avoided. Dumping often is not the same for both purposes, and indeed cannot be, given the significant difference in legal standards discussed above.

Both the "sales at less than fair value" phase and the material injury phase of an antidumping proceeding under Title VII of the Tariff Act of 1930 are investigative and non-adversarial in nature. Accordingly, although Title VII provides interested parties with a broad range of participatory rights during the proceeding, they are not afforded the full range of rights available under Administrative Procedure Act proceedings (for example, there is no right of cross-examination). As a result, a defendant in a 1916 Act case could be unfairly bound by determinations in which he had less complete rights of participation than he would in a full trial of a 1916 Act case, and should not be bound by <u>prima facie</u> acceptance of administrative determinations.

Proceedings under the 1916 Act and under Title VII of the Tariff Act of 1930 are, for the reasons noted above, materially different and essentially non-duplicative. Thus, there should be no requirement that a domestic industry exhaust its administrative remedy before pursuing a remedy under the 1916 Act. If it were appropriate in the circumstances of a particular case, however, a federal district court in a 1916 Act action could stay those proceedings pending resolution of the administrative proceeding.

(8) As noted in answer to question (3), the assessment of damages against an importer selling merchandise at "less than fair value" may conflict with U.S. obligations under the new Antidumping Code. Since the Subsidies/Countervailing Duty Agreement in no way addresses dumping practices or responses thereto, amendments to the 1916 Act dealing with antidumping measures would not conflict with that Agreement.

This letter reflects the views of the USTR and the Departments of Commerce, Justice and State. If you have any questions about our response or would like further information, please let me know.

Very truly yours,

Robert C. Cassidy, Jr.
General Counsel

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